①

No. 97-97 - 59 JUL 7 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

◆

ANTHONY DE MEO,

Petitioner,

—v.—

SMITH BARNEY INC., TRAVELERS, INC. and TONI ELLIOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS

ARTHUR M. WISEHART
Counsel of Record

WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

Counsel for Petitioner

121 pp

QUESTIONS PRESENTED

1. In dismissing an appeal from an order compelling arbitration of an age discrimination claim, did the Second Circuit err for reasons set forth in conflicting decisions in the Ninth and Seventh Circuits, and also in light of principles established by Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962), and Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 2 L.Ed.2d 988 (1959)?

2. Is an order compelling arbitration, notwithstanding a timely demand for a jury trial of whether an agreement to arbitrate had been made, contrary to the Seventh Amendment and Section 4 of the Federal Arbitration Act?

3. Is the mandatory waiver of statutory jury trial rights by virtue of the arbitration clause of an obsolete boilerplate form utilized by the securities industry in 1972, as applied to age discrimination claims not then in existence, but arising more than 20 years later, and involving a different employer, violative of the Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA")?

LIST OF PARTIES TO PROCEEDING BELOW

ANTHONY DE MEO,

Petitioner,

v.

SMITH BARNEY INC., TRAVELERS, INC. AND TONI ELLIOTT,

Respondents.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES TO PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI OR IN THE ALTERNATIVE, MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT . . 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE WRIT SHOULD BE GRANTED BECAUSE OF THE CONFLICT BETWEEN THE SECOND AND OTHER CIRCUITS, AND IN LIGHT OF THE POSITION OF THE EEOC 5

II. THE WRIT SHOULD BE GRANTED BECAUSE OF THE OWBPA'S RESTRICTIONS AGAINST WAIVER 7

III. THE WRIT SHOULD BE GRANTED IN LIGHT OF THE LINE OF CASES GIVING PRIORITY TO THE RIGHT OF JURY TRIAL 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 5, 6, 10

Availl, Inc. v. Ryder System, Inc., 913 F.Supp. 826 (S.D.N.Y. 1996) 10

Beacon Theatres v. Westover, 359 U.S. 500 (1959) i, 13-14

Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 536 U.S. 525 (1958) 14-15

Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) 7

Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) . . . . i, 2, 13

DeMeo v. Smith Barney, Inc., et al., 95 Civ. 5791 (S.D.N.Y. 1996) 2

DeMeo v. Smith Barney Inc., et al., Dkt. No. 96-9640 dated April 8, 1997 2

In re: Anthony DeMeo, Dkt. No. 97-3024, dated April 8, 1997 2

Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) 7

EEOC v. Midland Food Services, LLC, No. 1:96-MC-107 (N.D. Ohio) 7

EEOC v. River Oaks Imaging & Diagnostic, Civ. A. H-95-75 (S.D. Tex.) 7

First Options of Chicago, Inc. v. Kaplan, ___ U.S. ___, 115 S.Ct. 1920 131 L.Ed.2d 985 (1995) 10

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 6

Government of United Kingdom v. Boeing Company, 998 F.2d 68 (2d Cir. 1993) 12

Interbras Cayman Co. v. Orient Victory Shipping Co. S.A., 663 F.2d 4 (2d Cir. 1981) 12-13

Interocean Shipping Co. v. National Shipping & Trading Corporation, 462 F.2d 673 (2d Cir. 1972) 12

Johnson v. Hubbard Broadcasting, Inc., No. 4-96-cv-107 (D. Minn.) 7

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212 (1995) 8

Maye v. Smith Barney, Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) 10

McAllister Brothers, Inc. v. A & S Transportation Co., 621 F.2d 519 (2d Cir. 1980) 12

Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), cert. denied, ___ U.S. ___, 116 S.Ct. 61 (1995) 5

Pryner v. Tractor Supply Company, et al., 109 F.3d 354 (7th Cir. 1997) 5-6

Renteria v. Prudential Insurance Company of America et al., 113 F.3d 1104 (9th Cir. 1997) 5

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 2

Statutes and Other Authorities

United States Constitution, Seventh Amendment . . i, 14, 15

Federal Arbitration Act, 9 U.S.C. § 1-16 . . . . . . i, 3, 9, 11

9 U.S.C. § 4 . . . . 3, 11-12, 13

9 U.S.C. § 16(b)(2) 11

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 . . . . 9, 12

28 U.S.C. § 1292(a)(1) 9

All Writs Act, 28 U.S.C. § 1651(a) 2

Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. . . . . i, 3, 5, 6, 7, 8, 13

29 U.S.C. § 623 3

29 U.S.C. § 626(c)(1) 9

29 U.S.C. § 626(c)(2) 7, 9

Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) . . . . i, 3, 5, 6, 7, 8, 9

29 U.S.C. § 626(f)(1) 8

29 U.S.C. § 626(f)(1)(A) 8-9

29 U.S.C. § 626(f)(1)(B) 8, 9

29 U.S.C. § 626(f)(1)(C) 9

29 U.S.C. § 626(f)(1)(D) 9

29 U.S.C. § 626(f)(1)(E) 9

29 U.S.C. § 626(f)(3) 6, 8

16 Wright-Miller-Cooper, Federal Practice and Procedure
§ 3922 (2d Ed. 1995) 9

16B Wright-Miller-Cooper, Federal Practice and Procedure,
§ 4005 (2d Ed. 1996) 2

Pierre Levy, Gilmer Revisited: The Judicial Erosion
of Employee Statutory Rights,
26 N.M. L. REV. 455 (1996) 7

Wall Street Journal, June 20, 1997, p. B2 7

No. 97-______

In the Supreme Court
of the
United States

October Term, 1997

ANTHONY DE MEO,

Petitioner,

v.

SMITH BARNEY INC., TRAVELERS, INC. AND
TONI ELLIOTT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony DeMeo, plaintiff in the proceeding below, respectfully requests the issuance of a writ of certiorari or, in the alternative, mandamus to review the Order of the United States Court of Appeals for the Second Circuit dated April 8, 1997, denying petitioner's petition for a writ of mandamus, and the Order of the United States Court of Appeals for the Second Circuit dated April 8, 1997, dismissing petitioner's appeal.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit, In re: Anthony DeMeo, Petitioner, Dkt. No. 97-3024, dated April 8, 1997, denying the petition of Mr. DeMeo for a writ of mandamus is set forth in the Appendix at page 3a. The Mandate of the United States Court of Appeals for the Second Circuit is in the Appendix at 4a. The Order of the United States Court of Appeals for the Second Circuit, dated April 8, 1997, dismissing plaintiff's appeal is set forth in the Appendix at 5a to 7a. The transcript of the oral argument before the Second Circuit is in the Appendix at 8a to 19a. The Order of the United States District Court for the Southern District of New York, DeMeo v. Smith Barney, Inc., et al., 95 Civ. 5791 (S.D.N.Y. 1996), is in the Appendix at 20a to 24a.[1]

JURISDICTION

The Order of the Court of Appeals denying petitioner's petition for a writ of mandamus was entered on April 8, 1997. (4a) The Order of the Court of Appeals dismissing petitioner's appeal was entered on April 8, 1997. (7a) The jurisdiction of this Court arises under 28 U.S.C. § 1254(1) or, in the alternative, under the All Writs Act, 28 U.S.C. § 1651(a). See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); Schlagenhauf v. Holder, 379 U.S. 104, 109 (1964); 16B Wright-Miller-Cooper, Federal Practice and Procedure, § 4005, p. 111 (2d Ed. 1996).

---

[1] Citations followed by the suffix "a" refer to the Appendix which is annexed hereto.

STATUTES INVOLVED

The statutes involved are the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA"), and the Federal Arbitration Act, 9 U.S.C. § 1-16, particularly 9 U.S.C. § 4. The text of the statutes is set forth in the Appendix at 25a to 30a.

STATEMENT OF THE CASE

The effect of the decisions below is to compel petitioner DeMeo to arbitrate a 1994 age discrimination claim that he could not have anticipated having when, in 1972, he was required to sign, as a requirement of his employment, a boilerplate securities industry form, now expired obsolete and long since abandoned, in order to take a required examination. (53a-58a)

The District Court granted respondents Smith Barney Inc., et al., an order staying the prosecution of Mr. DeMeo's age discrimination case filed under the Age Discrimination in Employment Act, 29 U.S.C. § 623, under date of August 1, 1995, and compelling arbitration rather than first submitting to a jury, pursuant to Section 4 of the Federal Arbitration Act (9 U.S.C. § 4) (20a-24a), the disputed fact issue raised by Mr. DeMeo's affidavit of whether he had agreed to arbitrate such dispute.

The United States Court of Appeals dismissed Mr. DeMeo's appeal for lack of appellate jurisdiction (7a) and denied his petition for a writ of mandamus. (3a)

The pertinent language from the boilerplate of the 1972 document generated by the New York Stock Exchange and CBWL-Hayden Stone, Inc., relied upon by respondents, none of whom are parties to the document, reads as follows (84-86a):

> ". . . in consideration of the New York Stock Exchange, Inc.'s approving this application, I submit myself to the jurisdiction of such Exchange, and I agree as follows:
>
> * * *
>
> > "(j) I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and rules then obtaining of the New York Stock Exchange, Inc." [Emphasis added.]

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE OF THE CONFLICT BETWEEN THE SECOND AND OTHER CIRCUITS, AND IN LIGHT OF THE POSITION OF THE EEOC

The District Court's decision acknowledged the direct conflict between the Second Circuit and the Ninth Circuit on the public policy issue raised by the Ninth Circuit's decision in Prudential Insurance Co. of America v. Lai, 42 F.3d 1299, 1304, 1305 (9th Cir. 1994), cert. denied, ___ U.S. ___ , 116 S.Ct. 61 (1995), which the District Court considered to be "unpersuasive." (21a)

Since then, the Ninth Circuit has ruled that the waiver language comprising such an arbitration clause is unenforceable unless it puts the plaintiffs specifically "on notice that they were bound to arbitrate Title VII claims." Renteria v. Prudential Insurance Company of America et al., 113 F.3d 1104, 1108 (9th Cir. 1997).

For the reasons discussed in Point II below, the Older Workers Benefit Protection Act ("OWBPA") a fortiori would compel the same result as to age discrimination claims brought under the ADEA as the Ninth Circuit reached with regard to Title VII claims.

The uncertainty in the Circuits on the arbitration versus litigation issue involving such discrimination claims is exemplified by Pryner v. Tractor Supply Company, et al., 109 F.3d 354, 365 (7th Cir. 1997), in which the Seventh Circuit agonized over whether, in the context of the arbitration clause in a collective bargaining agreement, "enough [is] left of Alexander [Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)] to compel a decision in favor of the plaintiffs' [rights to litigate instead of being forced to arbitrate]. . . ," in light of this Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

The Seventh Circuit's opinion states, "Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so. Khan v. State Oil Co., 93 F.3d 1358, 1364 (7th Cir. 1996), cert. granted, 117 S. Ct. 941 (1997). The conservative reading of Gilmer is that it just pruned some dicta from Alexander--and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights." (Ibid.)

A stay of judicial proceedings in favor of arbitration therefore was denied by the Seventh Circuit on the basis of Alexander v. Gardner-Denver Co., supra.

It is submitted that the mandatory securities-industry arbitration clause here involved gives rise to questions similar to those presented by an arbitration clause in a collective bargaining agreement presented in Pryner, supra.

This Court's opinion in Gilmer contains dictum in a footnote that inferentially supports the "knowing" requirement of the two recent Ninth Circuit decisions cited above. Although Gilmer involved a claim that arose in 1987, before the effective date of the Older Workers Benefit Protection Act, which is applicable to invalidate the waiver of any "right or claim" in ADEA cases unless such waiver is "knowing and voluntary," 29 U.S.C. § 626(f)(3), the Court's opinion noted the existence of such requirement. (500 U.S. at 28, fn. 3.)

The importance of this Court's review of the issue is also shown by the fact that the Equal Employment Opportunity Commission is taking the position in various courts around the country that such mandatory arbitration requirements are invalid on public policy grounds. See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC); EEOC v. River Oaks Imaging & Diagnostic, Civ. A. H-95-75 (S.D. Tex.); EEOC v. Midland Food Services, LLC, No. 1:96-MC-107 (N.D. Ohio); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-cv-107 (D. Minn.) (amicus brief filed by EEOC); Pierre Levy, Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights, 26 N.M. L. REV. 455, 478 n.193 (1996), describing the EEOC's objections to mandatory arbitration.

Judicial notice of the ferment which the issue is currently provoking may be taken of an item in the Wall Street Journal, dated June 20, 1997, p. B2, indicating that the National Academy of Arbitrators and the American Arbitration Association have recently issued statements opposing mandatory arbitration in such disputes.

II. THE WRIT SHOULD BE GRANTED BECAUSE OF THE OWBPA'S RESTRICTIONS AGAINST WAIVER

The importance of this Court's consideration of the matter is shown by the District Court's conclusion that the non-waiver provisions of the OWBPA do not apply to jury trial rights that are granted under the ADEA (22a)

Contrary to the District Court's assumption (22a) the determination of whether such waiver is "knowing and voluntary" is itself a question that is required to be determined by a jury under the OWBPA. 29 U.S.C. § 626(c)(2).

Disregarded by the District Court was the principle that the boilerplate used by the securities industry in 1972 was subject to the rule requiring ambiguous language to be construed against the party that drafted it as established by this Court's decision in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63, 115 S.Ct. 1212 (1995).

Moreover, the burden of proof that the waiver was "knowing and voluntary" is placed by the OWBPA on the employer, Smith Barney Inc. 29 U.S.C. § 626(f)(3).

In indicating that the provisions of the OWBPA providing protection against inadvertent waivers is limited only to "claims," but does not embrace within its scope the "right" to utilize "a specific forum" to determine those claims, the District Court's order errs as a matter of law. (22a)

Contrary to the District Court's conclusion, the OWBPA amendment to the ADEA provides that "An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." (29 U.S.C. § 626(f)(1); emphasis added.)

To be effective, any such waiver document is required to refer specifically to the statutory "rights or claims" waived under the statute (29 U.S.C. § 626(f)(1)(B)), subject to a number of restrictions that plainly would rule out the long obsolete and abandoned 1972 application form respondents rely upon. (Emphasis added.)

Minimum requirements under the OWBPA for an effective waiver violated by the District Court's order include the following:

> The waiver must be part of a written agreement written in a manner calculated to be understood

> by the employee signing it. 29 U.S.C. § 626(f)(1)(A);
>
> The waiver must specifically refer to rights and claims arising under Age Discrimination in Employment Act. 29 U.S.C. § 626(f)(1)(B);
>
> The waiver must not waive "rights or claims" that may arise after the date the waiver is executed. 29 U.S.C. § 626(f)(1)(C);
>
> The agreement containing the waiver must provide consideration (i.e., some compensation or other form of value) in addition to what the employee receives by contract or law if he does not agree to the waiver. 29 U.S.C. § 626(f)(1)(D); and
>
> The employee must be advised in writing to consult with an attorney prior to executing the agreement. (29 U.S.C. § 626(f)(1)(E).

Prominently stated in the OWBPA as among the "rights" that are not subject to waiver is the right to "bring a civil action in any court of competent jurisdiction" where such person "shall be entitled to a trial by jury. . . . " (29 U.S.C. § 626(c)(1) & (2).)

The statutory jury trial rights are applicable "regardless of whether equitable relief is sought by any party in such action," such as a motion to compel arbitration. (29 U.S.C. § 626(c)(2).) Thus the statutory right of a jury trial that is granted "regardless of whether equitable relief is sought by any party in such action" prevails over inconsistent provisions in the Federal Arbitration Act. Therefore, an order compelling arbitration, which by definition is both inconsistent with such right of jury trial, and also a form of equitable relief, therefore is appealable under 28 U.S.C. § 1291 and § 1292(a)(1), since specific performance is long established to be a form of equitable relief. See 16 Wright-Miller-Cooper, Federal Practice and Procedure § 3922, p. 76 (2d Ed. 1995).

As stated in Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 fn. 21 (1973), "Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability of this forum." (Emphasis added.)

This Court has held that unless the contract itself specifies otherwise, the courts rather than the arbitrator must decide whether the parties agreed to arbitrate an issue. See First Options of Chicago, Inc. v. Kaplan, ___ U.S. ___, 115 S.Ct. 1920, 1923-24, 131 L.Ed.2d 985 (1995). The Court's holding "suggests that the related and antecedent issue of whether an agreement to arbitrate is a contract of adhesion, fraudulently induced, or otherwise revocable, is an issue for the court as well, because essential to the First Options inquiry is the assumption that an agreement to arbitrate was made voluntarily." Availl, Inc. v. Ryder System, Inc., 913 F.Supp. 826, 831 (S.D.N.Y. 1996) (Mukasey, J.); see also Maye v. Smith Barney, Inc., 897 F. Supp. 100, 106 n.3 (S.D.N.Y. 1995).

The District Court decided respondents' motion to stay the litigation and compel arbitration solely on the basis of affidavits notwithstanding the existence of disputed fact issues as to whether there was an agreement to arbitrate the dispute.

In doing so, the District Court relied upon a New York Stock Exchange letter dated August 10, 1972, as support for its statement that Mr. DeMeo "did take and pass [the registered representatives'] exam, which resulted in the approval of his Form RE-1." (21a)

However, this is inconsistent with a subsequent letter dated October 23, 1972, which states that the New York Stock Exchange was "closing our files" on Mr. DeMeo in view of lack of further action by the firm of Hayden Stone because the processing of the application had not been completed. (91a) The approval of the application by the New York Stock Exchange was explicitly made a condition precedent of the applicability of the arbitration clause, as shown in the portion of the boilerplate quoted above at p. 4.

Additional disputed fact issues ignored by at the District Court presented by Mr. DeMeo's affidavit include:

> (1) Whether the boilerplate application form is inapplicable because the 1972 document is obsolete on a form that was long ago abandoned by the New York Stock Exchange (DeMeo Aff. ¶¶ 37-52) (57a-60a);
>
> (2) Whether the application form covers within its scope the age discrimination claims that are the subject of this lawsuit (DeMeo Aff. ¶¶ 53-55) (60a); and
>
> (3) Whether said application form is inapplicable to some of the respondents who are not parties to it. (DeMeo Aff. ¶¶ 57-59). (61a)

Section 16 of the Federal Arbitration Act, added in 1988, contemplates compliance with the jury trial requirements of Section 4 since Section 16 (b)(2) refers to an order "directing arbitration to proceed under section 4 of this title . . . ." (9 U.S.C. § 16(b)(2); emphasis added.) Section 4 of the Act contains explicit jury trial rights invoked by Mr. DeMeo.

Therefore, in view of the disputed fact issues shown in the affidavit of Mr. DeMeo in opposition to Smith Barney's motion (51a-69a), the motion to stay the litigation and compel arbitration should have been denied by the District Court. As stated in McAllister Brothers, Inc. v. A & S Transportation Co., 621 F.2d 519, 524 (2d Cir. 1980):

> ". . . the district court was required to hold an evidentiary hearing on McAllister's claim that Pollution and PCI are bound by the contract rather than resolve the issue solely on the basis of the parties' affidavits and memoranda of law."

Because there has been no finding by a jury of whether there is "an agreement in writing for such arbitration," as required by 9 U.S.C. § 4, appellate jurisdiction exists under 28 U.S.C. § 1291. See Interocean Shipping Co. v. National Shipping & Trad Corporation, 462 F.2d 673, 675 fn. 3 (2d Cir. 1972), which states:

> "An order compelling arbitration under § 4 of the Federal Arbitration Act is a final order and is appealable under 28 U.S.C. § 1291 (1970). Hellenic Lines, Ltd. v. Louis Dreyfus Corporation, 372 F.2d 753, 754 (2 Cir. 1967); Chatham Shipping Co. v. Fertex S.S. Corp., 352 F.2d 291, 294 (2 Cir. 1965).

See also Government of United Kingdom v. Boeing Company, 998 F.2d 68 (2d Cir. 1993).

Interbras Cayman Co. v. Orient Victory Shipping Co. S.A., 663 F.2d 4, 7 (2d Cir. 1981), holds that the District Court should not have decided such issues on affidavits, contrary to its procedure in the instant case, but is required to "proceed summarily to a trial thereof" before a jury in accordance with 9 U.S.C. § 4.

III. THE WRIT SHOULD BE GRANTED IN LIGHT OF THE LINE OF CASES GIVING PRIORITY TO THE RIGHT OF JURY TRIAL

The decision of the Second Circuit is inconsistent with the decisions of this Court giving priority to the claim of a right of jury trial. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 2 L.Ed.2d 988 (1959).

The importance of review by this Court of the decisions below giving priority to arbitration over jury trial rights is shown by its inconsistency both with the language of the ADEA and Beacon Theatres v. Westover, 359 U.S. 500, 510-511 (1959), which states:

> "If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to

> preserve jury trial. As this Court said in Scott v. Neely, 140 U.S. 106, 109-110: 'In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.' This long-standing principle of equity dictates that only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules, we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." (Emphasis added.)

Because the District Court in the instant proceeding relegated Mr. DeMeo's age discrimination claim to an arbitration process to which he had not consented an important question is also presented involving Seventh Amendment rights.

Mr. DeMeo's denial that there is a contract in effect that requires arbitration of the dispute is a common law contract issue of the type which the Seventh Amendment requires to be preserved for jury determination. The Seventh Amendment states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

As stated in Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 536 U.S. 525, 537 (1958):

"The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence--if not the command--of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Ibid. (footnote omitted)."

CONCLUSION

Because constitutional rights under the Seventh Amendment are involved, as well as novel issues under the OWBPA, and a split in the Circuits on a matter of public policy, review by this Court of the issues presented is of great importance.

For the foregoing reasons, the petition should be granted.

July 7, 1997

Respectfully submitted,

WISEHART & KOCH

Arthur M. Wisehart

Arthur M. Wisehart
(Counsel of Record)

19 West 44th Street, Suite 412
New York, New York 10036
(212) 730-0044

APPENDIX

TABLE OF CONTENTS FOR APPENDIX

Order of the United States Court of Appeal for the Second Circuit denying the petition for mandamus dated April 8, 1997 . . . . 3a

Mandate of the United States Court of Appeals for the Second Circuit dated April 8, 1997 . . . . 4a

Order of the United States Court of Appeals for the Second Circuit dated April 8, 1997, dismissing appeal 5a-7a

Transcript of the Oral Argument before the Second Circuit on April 8, 1997 . . . . 8a-19a

Order and Memorandum Opinion of the United States District Court for the Southern District of New York dated December 2, 1996 . . . . . . 20a-24a

Constitutional and Statutory Provisions Involved . . 25a-30a

United States Constitution, Seventh Amendment 25a

All Writs Act, 28 U.S.C. § 1651(a) 25a

Federal Arbitration Act, 9 U.S.C. §§ 1-4, 16 . . . . 25a-29a

Age Discrimination in Employment Act, 29 U.S.C. §§ 626(c)(1) & (2) 29a

Older Workers Benefit Protection Act, 29 U.S.C. §§ 626(f)(1)(A)-(E) & (3) 29a-30a

Cross-Petition for a Writ of Mandamus
dated April 1, 1997 . . . . 31a-35a

Affidavit in Opposition to the Motion to Dismiss the Appeal and in Support of the Petition for a Writ of Mandamus on Behalf of Plaintiff-Appellant sworn to April 1, 1997 . . . . 36a-41a

Exhibit 2: Complaint dated August 1, 1995 . . . . 42a-51a

Exhibit 3: Affidavit of Anthony De Meo sworn to June 10, 1996 . . . . 52a-77a

Exhibit A: Excerpts of New York Stock Exchange, Inc. Application of Anthony John DeMeo dated June 20, 1972 . . . . 78a-86a

Exhibit B: Resume of Anthony J. DeMeo 87a-90a

Exhibit C: Letter dated October 23, 1972 . . . . 91a

Exhibit G: Plaintiff's Second Request for Production of Documents with Respect to Defendants' Motion to Compel Arbitration dated March 6, 1996 (without exhibits) 92a-96a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SDNY
WOOD
95-cv-5791

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 8th day of April, one thousand nine hundred and ninety-seven.

BEFORE:
Hon. Ellsworth A. Van Graafeiland
Hon. John M. Walker
Circuit Judges
Hon. J. Garvan Murtha*
District Judge

FILED
April 08, 1997
George Lange III, Clerk

Docket No. 97-3024

IN RE:
ANTHONY DE MEO,

Petitioner

A petition for a writ of mandamus having been filed,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

George Lange III, Clerk
By: /s/
Arthur M. Heller
Administrative Attorney

---

* Hon. J. Garvan Murtha, United States District Court for the District of Vermont, sitting by designation.

MANDATE

UNITED STATES COURT OF APPEALS SDNY
FOR THE SECOND CIRCUIT Wood
95-CV-5791

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 8th day of April, one thousand nine hundred and ninety-seven.

BEFORE: Hon. Ellsworth A. Van Graafeiland
Hon. John M. Walker
Circuit Judges
Hon. J. Garvan Murtha*
District Judge

FILED
April 08, 1997
George Lange III, Clerk

IN RE: Docket No. 97-3024

ANTHONY DE MEO,

Petitioner

A petition for a writ of mandamus having been filed,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

George Lange III, Clerk
By: /s/
Arthur M. Heller
Administrative Attorney

*Hon. J. Garvan Murtha, United States District Court for the District of Vermont, sitting by designation.

ISSUED AS MANDATE
April 8, 1997

T1080

PAGE 1

United States Court of Appeals
For the Second Circuit

Each motion must be accompanied by a supporting affidavit.

DE MEO,

V.

SMITH BARNEY INC., et al.

96-9640

NOTICE OF MOTION

Dismissal of
Appeal for
Lack of Appellate
Jurisdiction

MOTION BY:

Michael Delikat

Orrington, Herrington
& Sutcliffe LLP
666 Fifth Avenue
New York , New York 10103
(212) 506-5000-5230

OPPOSING COUNSEL:

Arthur M. Wisehart

Wisehart & Koch
19 West 44th Street
Suite 412
New York, New York
(212) 730-0044

Has consent of opposing counsel:
A. been sought? X Yes No
B. been obtained? Yes X No
Has service been effected? X Yes No
Is oral argument desired? X Yes No
(Substantive motions only)
Requested return date: April 8, 1997
(See Second Circuit Rule 27(b))

Has argument date for appeal been set:

A. by scheduling order? X Yes X No

B. by firm date of argument notice? Yes X No

C. If Yes, enter date: no earlier than June 16,1997

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? (See F.R.A.P. Rule 8) Yes No

Would expedited appeal eliminate need for this motion? Yes No

If No, explain why not:

Will the parties agree to maintain the status until the motion is heard? Yes No

Judge or agency whose order is being appealed:
Honorable Kimba M. Wood, U.S.D.J.

Brief statement of the relief requested:
Order dismissing appeal for lack of appellate jurisdiction.

By: (Signature of attorney)	Appearing for: (Name of party)
/s/	Appellees
Signed name must be printed beneath	Date February 28, 1997
Michael Delikat (MD-1165)	
	Appellant or Petitioner: Plaintiff Defendant
	Appellee or Respondent Plaintiff X Defendant

________________**ORDER**______________________
Kindly leave this space blank

BEFORE: VAN GRAAFEILAND, WALKER, CJJ and MURTHA, DJ.

IT IS HEREBY ORDERED that the motion be and hereby is granted XXXXXd

FOR THE COURT,
GEORGE LANGE III, Clerk
By:/s/__________
Arthur Heller
Administrative Attorney

April 8, 1997
Date

FILED
April 8, 1997

[1]

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

--------------------------------x

ANTHONY DeMEO
Plaintiff,

vs

SMITH, BARNEY, INC., THE TRAVELERS, INC., and TONI ELLIOTT.

Defendants.

--------------------------------x

CORRECTED TRANSCRIPT OF ORAL ARGUMENT

April 8, 1997
One Foley Square
New York, New York

BEFORE:
HON. ELLSWORTH A. VAN GRAAFEILAND

HON. JOHN M. WALKER, JR. - Presiding

HON. J. GARVAN MURTHA - Sitting By Designation

[2]

APPEARANCES:

WISEHART & KOCH
Attorneys for Plaintiff - Appellant
19 West 44th Street
New York, New York 10036
(212) 730-0044

BY: ARTHUR WISEHART, ESQ.

ORRICK HERRINGTON & Sutcliffe, LLP,
Attorneys for Defendants - Appellees
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

BY: MICHAEL DELIKAT, ESQ.

[3]

THE COURT: I will now hear DeMeo.

AN ATTORNEY: Good morning. May it please the court.

I am Mike Delikat of Orrick Herrington & Sutcliffe attorneys for the lead party today, Smith Barney defendants and Elliot.

Despite appellant's efforts to get to the merits of his underlying dispute, this motion presents a routine question of appellate jurisdiction, and our motion is to dismiss the appeal today, because Judge Kimba Wood's order compelling arbitration was clearly an interlocutory and the order under 28 USC 1291 her order is simply not subject to appeal at this time.

This is a classic example of an imbedded and not an independent proceeding, and as a result there is no appellate review. Moreover, Section 16 of Federal Arbitration Act expressly prohibits review of an interlocutory order such as this and the Court found in the Filanto case, recognized the significance of the 1988 amendments to the federal arbitration act of

1988 expressing a public policy limiting appeals from orders directing arbitration.

Because these principles seem so clear and the results seem so inevitable, it seems as though the common focus has shifted towards arguing that he should have had a jury trial right below on the issue of whether or not a valid arbitration agreement was formed.

As recently as February of 1997 this court in the Distajo matter clearly set forth the principle that there is no automatic entitlement to a jury trial on the issue of whether an arbitration agreement was made.

The burden is clearly on the party, in this case DeMeo, resisting arbitration to show that he is entitled to a jury trial and he can only do that if he can demonstrate if there is a disputed issue of a material fact to be tried.

There is a heavy burden, and the courts have expressed that Mr. DeMeo must have produced evidence to substantiate this

[5]

denial that a -- arbitration even existed.

Here, I guess clearly Judge [Wood] correctly concluded that there was no genuine issue for trial, no disputed issue of fact with respect to the issue for trial with respect to the underlying agreement to arbitrate and therefore this request for the jury trial right did not need to be granted in order to get to this point today.

For those reasons I think it is clear that there is no appellate jurisdiction with respect to the appeal, and we would respectfully request that the court decide on the motion to dismiss before we have an obligation to submit a brief on the underlying appeal which is now slated for me 26th. Thank you.

THE COURT: Very well. Mr. DeMeo.

MR. WISEHART: May it please the, Court, I am Arthur Wisehart.

THE COURT: Yes.

MR. WISEHART: Of course we take issue with the contentions made that the not appealable. We think it is governed by the case of United Kingdom against Boeing in which it was specifically held that under 28 USC 1291 an order compelling arbitration was appealable under the Interocean case, and that is a 1988 decision. And we think it applies in this case, because this again is an order compelling arbitration. And the argument that they make on the other side does not address that issue, that is the law of this circuit.

In the case of United Kingdom against Boeing, there was an agreement to arbitrate, but the agreement did not go so far as to require separate arbitrations to be consolidated. And therefore, the court held that the order compelling arbitration on a consolidated basis could be reviewed under 28 USC 1291. And it cited the Interocean case, and that is the law of this Circuit, it is appealable and jurisdiction does exist for that purpose.

Furthermore, the defendants argue that under the leading case of Gilmer the issue

is not raised, whereas in Gilmer in footnote 3, it specifically states referring to the Older Workers Benefit and Protection Act, that agreements to arbitrate have to be shown to be knowing and voluntary. The issue --

THE COURT: I want to hear you discussing the distinction between the imbedded and an independent proceeding.

MR. WISEHART: We have discussed that in

our memorandum. Our position is --

THE COURT: This is an imbedded proceeding; is it not?

MR. WISEHART: Our position is, it is their motion to compel and that their motion to compel is itself an independent proceeding. We did not raise this in our pleadings.

THE COURT: That would be true in every proceeding.

MR. WISEHART: I don't believe so, your Honor. In other proceeding involve stays. This is a motion that they made under Section 4 of the Federal Arbitration Act. Section 16 of the Federal Arbitration

Act, which they base their argument upon clearly states that it applies only to disputes under Section 3 or Section 4.

Both Section 3 and Section 4 say that the predicate of their applicability is the existence of an agreement to arbitrate.

We therefore say that the predicate or application of the Federal Arbitration Act is not established for the purpose of this proceeding or for the purpose of this appeal, and if Section 16 does not apply, and that their motion to compel is just the same as any other claim, cause of action.

Furthermore, I would point out in this instance, the Older Workers Benefit Protection Act, which we have referred to extensively in our memorandum --

THE COURT: Do you have a case in which an independent proceeding is brought by someone other than the plaintiff, who is seeking an order to compel or prohibit arbitration?

MR. WISEHART: I think that that is -- I think that is involved in the U.K.

[9]

against Boeing.

THE COURT: The independent cases seem to be ones in which the the plaintiff is seeking an order compelling the arbitration.

No other party is seeking any other relief. You brought an independent, you brought a separate claim, you brought a claim for relief, independent of it for damages, apart from the arbitration, you did not seek arbitration and sought damages and injunctive relief.

MR. WISEHART: Right. We did not seek a declaratory order that arbitration did not apply, because there is no arbitration agreement. So, therefore it is their cross, their motion which in our view is in the nature of an independent proceeding. It is the same as if they made a counterclaim or did whatever.

It is not the same as a stay under Section 3 of the Federal Arbitration Act, it is a request under Section 4 for an order to compel.

[10]

And I just want to inject this thought, your

Honor.

Under section, under the Older Workers Benefit Protection Act, which became effective in 1990, it states specifically that you cannot have a waiver of rights, and those rights include the right to jury trial. So far as I know this is an issue that has not been addressed by this court ever before. Now, the significance of that point is that the right to jury trial is set forth in the Older Workers Benefit Protection Act and the ADEA, which states specifically that it shall apply even in cases in which equitable remedies are sought. So you have a case in which the other side seeks equitable remedies --

THE CHAIRPERSON: What we are talking about now is the appealability of issues.

MR. WISEHART: Right. I understand that.

THE COURT: These issues are all appealable. They are all appealable at the right time. And you know, you can attack

[11]

the arbitration after it occurs, just as easily as now.

MR. WISEHART: Oh, that is not true, your Honor. That is the problem.

THE CHAIRPERSON: Why not? Why?

MR. WISEHART: Because you are hit with contentions about collateral estoppel. That is the whole problem of this.

And you go through the --

You know, in the Middle Ages they had a procedure called peine fort et dure. You have to go through an entire arbitration procedure, you have to go through --

THE COURT: We do that all of the time because piecemeal appeals are so disfavored. You waited until the end of the proceeding.

MR. WISEHART: Your Honor, let me just bring up --

THE COURT: To carry your argument -- excuse me -- to carry your argument to a logical extreme, virtually every time a person is aggrieved by a district court ruling that necessitates further proceedings

in the lower courts, they could come up here and appeal. And that is just not the way we operate.

It has to be a completely separate and inseverable, independent proceeding in order to contain this kind of appealability that you are seeking. And it is --

MR. WISEHART: May just interject a thought?

THE COURT: Go ahead.

MR. WISEHART: The decision of the district courts in this case compelling arbitration was based solely on conflicting fact affidavits. This court has said over and over again, it will not approve the granting of summary judgment, which this is like, on the basis --

THE COURT: Oh, this is not summary

judgment. This is a simple case that comes up all of the time. They don't want to arbitrate. The arbitrators will decide whether they have got the jurisdiction, and if they are wrong, you come up again.

MR. WISEHART: Well, your Honor, let me

just give you an example of another case in the district --

THE COURT: Ah --

THE WISEHART: Can I?

THE COURT: I think we have got your point, and you have made it very clearly, counsel.

MR. WISEHART: Well, I know, but I --

THE COURT: The meaning --

MR. WISEHART: I am not going to repeat it. I am going to point to another court, district court case that will show you how they don't come up the same way time after time. This is the case by Judge Sheindlin, which we cite in our papers, and she goes through an extensive program to make sure that there was in fact an agreement that existed, that it was not induced under any false pretenses, that there was ample discovery in order to establish whether or not there is a --

THE COURT: You can make the same arguments to the arbitrator.

MR. WISEHART: No, we can't, because

the arbitrators are not skilled in this area. I have here --

THE COURT: All right.

MR. WISEHART: I have an article that was just came out this week to the American, to the registered representatives in the securities industry, in which it contends at great length that the arbitration process is slanted against them. It is not the same as if this court was making the decision.

THE CHAIRPERSON: All right, counsel, we have your point.

Do you have anything further, anybody?

AN ATTORNEY: Just very briefly.

The Boeing case was an independent proceeding where it was and action to compel arbitration, and that is why the court took that one up.

The arguments that Mr. Wisehart is suggesting with the Older Workers Benefit Protection Act related only to a waiver.

This is about a forum and not about a waiver of an age discrimination claim. He

[15]

compresses an age discrimination claim in the particular proceedings.

MR. WISEHART: May I say something?

THE COURT: No.
We are prepared to rule.

We grant the motion dismissing the appeal from the order compelling arbitration, and we deny the petition for the writ of mandamus.

oOo

[16]

CERTIFICATE

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

I, Robert X. Shaw, CSR, a Notary Public within and for the State of New York, do hereby certify that the within is a true and accurate transcript of the taped proceedings taken on April 8, 1997.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of June, 1997.

/s/

ROBERT X. SHAW, CSR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--x

ANTHONY DE MEO,

Plaintiff,

-against-

95 Civ. 5791 (KMW)
ORDER

SMITH BARNEY INC., et al.,

Defendants.
--x

WOOD, D.J.

Presently before the court is defendants' motion to compel arbitration in this action based on age discrimination in employment. The Federal Arbitration Act establishes a federal policy in favor of arbitration; courts should not look upon arbitration as a "second best" solution. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 225-26 (1987); McMahan Securities Co. v. Forum Capital Markets L.P., 35 F.3d 82, 86 (2d Cir. 1994).

Plaintiff's defenses to the motion are meritless. In determining whether a motion to compel arbitration should be granted, the Second Circuit has stated that courts must be "mindful that the 'federal policy favoring arbitration requires [courts] to construe arbitration clauses as broadly as possible' and that 'arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" McMahan Securities Co., 35 F.3d at 86 quoting S.A. Mineracao Da Trindade-Samitri v. Utah International Inc., 745

F.2d 190, 194-95 (2d Cir. 1984). The arbitration clause in question -- which applies to "any controversary arising out of [the signer's] employment or the termination of [the signer's] employment" -- unquestionably covers the employment discrimination claim at issue in this action.

Initially, plaintiff apparently contends that I should not grant this motion to compel arbitration because plaintiff understood the arbitration clause at issue to be limited to controversies "involving the trading of securities for customers, and did not [understand the clause to] include age discrimination 'claims."' Essentially, plaintiff is arguing, based on the holding in Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), that in order to grant a motion to compel arbitration this court must find that plaintiff knowingly agreed to forego his statutory remedies in favor of arbitration. However, courts in this district that have considered this issue have found the Lai decision unpersuasive, as do I. See Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995); Hall v. MetLife Resources, No. 94 Civ. 0358, 1995 WL 258061 at *3-4 (S.D.N.Y. May 3, 1995). Plaintiff's contention is particularly unconvincing in this case, in which the arbitration clause at issue is phrased in terms that would clearly alert the average reader that the clause was intended to cover employment disputes such as discrimination claims.

Next, plaintiff contends that no valid arbitration clause exists because the New York Stock Exchange (the "NYSE") Form RE-1 containing the arbitration clause that he signed was never approved. Plaintiff's claim that his Form RE-1 was never approved is controverted by record of the Central Registration Depository submitted by plaintiff and a letter from the NYSE dated August 10, 1972, submitted by defendants. Although plaintiff was late in taking the required examination to become a registered representative, he did take and pass that exam, which resulted in the approval of his Form RE-1.

Finally, plaintiff contends that because he is bringing an age discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), his claims are not subject to compulsory arbitration. Insofar as plaintiff is arguing that his claims are not arbitrable because in signing the arbitration clause at issue he was not knowingly agreeing to arbitrate age discrimination claims, I have already dealt with this argument above, in my discussion of Lai. Insofar as plaintiff is arguing that the provisions of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA") which require a knowing waiver of age discrimination claims, apply here, I note that the provisions require a knowing waiver of "claims," not of a specific forum.

Moreover, because the arbitration clause at issue was clearly worded to alert the average reader that employment discrimination claims were subject to compulsory arbitration, plaintiff cannot make a credible claim that he did not knowingly agree to arbitrate any potential discrimination claims.[1]

---

[1] Plaintiff argues that even if his claims against Smith Barney, Inc. ("Smith Barney"), which is a member of the NYSE, are subject to compulsory arbitration, his claims against Toni Elliot and The Travelers Group, both non-members of the NYSE, are not subject to compulsory arbitration. The Travelers Group is an affiliate of Smith Barney. The arbitration clause signed by plaintiff specifically stated that he agreed to arbitrate any controversy between himself and any NYSE member organization, or affiliate of an NYSE member organization. In addition, the rules of the NYSE, which plaintiff agreed to follow, require the arbitration of "any dispute, claim or controversy between a . . . nonmember [such as The Travelers Group] and . . . [an] associated person [such as plaintiff] arising in connection with the business of such associated person in

Defendants request that I award them their costs, expenses and attorneys' fees in connection with this motion without stating any legal basis for this request or presenting any argument in its favor. Defendants are directed to submit a letter to the court by December 17, 1996, stating the legal and factual basis for this request. Plaintiff may submit a letter in opposition to this request by January 2, 1997. Defendants may submit a letter in reply by January 9, 1997.

Conclusion

For the reasons set forth above, I grant defendants' motion to compel arbitration and to stay this action pending the conclusion of the arbitration proceedings.[2] Plaintiff and the

---

connection with his activities as an associated person . . . upon the demand of the . . . non-member." NYSE Rule 600(a).

Rule 600(a) also requires plaintiff, a non-member of the NYSE, to submit to arbitration his claims against Toni Elliott, who, as an Executive Vice President of Smith Barney, is an associated person under the direct control of Smith Barney, a member organization. See Maye 897 F. Supp. at 108-09 (employees' employment discrimination claims against individual, non-NYSE member officers of Smith Barney are subject to arbitration pursuant to NYSE Rule 600(a)).

[2] On March 18, 1996, instead of filing his opposition to the motion to compel arbitration, as he had been ordered to do by the Court, plaintiff filed a "Cross-Motion (a) For a Jury Determination of Issues Pursuant to Section 4 of the Federal Arbitration Act, (b) to Alter or Amend an Order, and (c) for Additional Discovery." After admonishment from the Court, the plaintiff filed his response to defendant's motion to compel

defendants are directed to notify this court of the status of the arbitration by May 20, 1997.

So Ordered.

Dated: New York, New York
December 2, 1996

/s/
Kimba M. Wood

United States District Judge

A copy of this Order has been mailed to counsel for each of the parties.

---

arbitration. In his cross-motion, plaintiff makes substantially the same arguments he made in his response to the defendants motion to compel arbitration, which I have discussed in detail above. In addition, plaintiff contends that he is entitled to a jury determination on the question of whether an arbitration agreement existed at the time in question. I find that there is sufficient evidence in the papers submitted for me to determine that there was an arbitration agreement in effect at the time in question, and that a jury determination is not necessary.

Therefore, for the reasons set forth in this order, the plaintiff's cross-motion is hereby denied.

Constitutional and Statutory Provisions Involved

United States Constitution, Seventh Amendment:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

All Writs Act, 28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Arbitration Act, 9 U.S.C. § 1 et seq.

§ 1 "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction,, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

9 U.S.C. § 16 - Appeals

"(a) An appeal may be taken from --

(1) an order --

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title,

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order --

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

Pertinent Portions of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.:

29 U.S.C. § 626(c)(1):

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminated upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this Act.

29 U.S.C. § 626(c)(2):

> "In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."

Older Workers Benefit Protection Act,
29 U.S.C. § 626(f), in pertinent part:

(1) "An individual may not waive any right or claim under this act unless the waiver is knowing and

voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate,

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

* * *

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (@), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
---------------------------------x

No.

In re ANTHONY DE MEO,

Petitioner ,

CROSS-PETITION FOR
A WRIT OF MANDAMUS

---------------------------------x

ANTHONY DE MEO

Docket No. 96-9640

Plaintiff-Appellant,

-against-

SMITH BARNEY INC.,
THE TRAVELERS INC.,
and TONI ELLIOTT.

Defendants-Appellees.
---------------------------------x

PETITION FOR WRIT OF MANDAMUS, IN THE ALTERNATIVE

Anthony DeMeo, the plaintiff in the above entitled action against Smith Barney Inc., the Travelers Inc., and Toni Elliott, respectfully petitions for the issuance of a writ of mandamus pursuant to 28 U.S.C. § 1651, and Fed.R.App.P. 21, directed to the Hon. Kimba M. Wood, U.S.D.J., United States District Court for the Southern District of New York, for an order (a) reversing and vacating the Order of said Court dated December 2, 1996 (Exhibit A annexed hereto) and (b) requiring said Court to submit to a jury duly convened the issues listed below.

ISSUES PRESENTED

This cross-petition for a writ of mandamus is presented in the alternative with the request that it be considered and acted upon if the motion to dismiss on jurisdictional grounds of defendants-appellees dated February 28, 1997, is granted, contrary to Mr. DeMeo's position that it is without merit.

The issues presented are (1) whether a jury determination was required with regard to Mr. DeMeo's contention that there is no written agreement for arbitration of the claims presented in the above entitled action, (2) whether Mr. DeMeo was also entitled to a jury determination with respect to the further issue presented under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) that there was no "knowing and voluntary" waiver by Mr. DeMeo of his right to have said right and claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), and for the remedies thereunder provided to be determined by a Federal Court and jury pursuant to 29 U.S.C. §§ 626(b) and 626(c), and (3) whether Mr. DeMeo should receive necessary discovery relevant thereto.

The issues are discussed in detail in the Memorandum of Law dated April 1, 1997, submitted herewith.

The facts necessary to understand the issues presented by the petition are contained in the affidavit of Arthur M. Wisehart sworn to April 1, 1997.

REASONS WHY THE WRIT SHOULD ISSUE

The writ of mandamus should issue in order to protect and preserve the jury trial rights of petitioner DeMeo from infringement.

Unless the petition is granted, the rights of petitioner DeMeo to a trial by jury of issues set forth above are threatened by being subjected to compulsory arbitration under the District Court's Order of December 2, 1996, causing irreparable injury to petitioner.

As stated in In re Hooker Investments, Inc., 937 F.2d 833, 837 (2d Cir. 1991):

> "Although we do not have jurisdiction over the Bank's attempted appeal as a matter of right from the non-final bar order, we may in appropriate circumstances treat an unsuccessful attempt to appeal as a petition for a writ of mandamus. See, e.g., Richardson Greenshields Securities, Inc., 825 F.2d at 652. Indeed, the Bank has asked us to review the bar order under our mandamus power if we should find ourselves to be without statutory appellate jurisdiction. The Bank claims that the bar order threatens its seventh amendment right to a trial by jury in the adversary proceeding, and there is a clear line of cases holding that when an otherwise unappealable order denies a claimed right to a jury trial, immediate review may be obtained by way of a petition for mandamus. See, e.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 2 L.Ed.2d 988 (1959); Higgins v. Boeing Co., 526 F.2d 1004, 1006 (2d Cir. 1975) (per curiam). We see no reason not to follow this practice in the bankruptcy context. See Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), 911 F.2d 380, 387-88 (10th Cir. 1990). Though we believe

> that mandamus should be used sparingly, it is justified in this case. We therefore treat the Bank's appeal as a petition for a writ of mandamus and turn to the merits of its claim." (Emphasis added.)

Judicial review of the District Court's decision is in the public interest particularly in view of the position that the Equal Employment Opportunity Commission is currently taking in a number of cases throughout the United States.

The Equal Employment Opportunity Commission has strongly asserted the position that such compulsory arbitration provisions are unenforceable on public policy grounds in a number of cases being litigated around the country. See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC); EEOC v. River Oaks Imaging & Diagnostic, Civ. A. H-95-75 (S.D. Tex.); EEOC v. Midland Food Services, LLC, No. 1:96-MC-107 (N.D. Ohio); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-cv-107 (D. Minn.) (amicus brief filed by EEOC); Pierre Levy, Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights, 26 N.M. L. REV. 455, 478 n.193 (1996), describing the EEOC's objections to such compulsory arbitration procedures.

Judicial review of the issues presented at this time is especially important because of the uncertain state of the law with regard to such issues in courts in various Circuits. Legal issues of first impression involving new and important matters are presented, including the applicability of the restrictions on inadvertent waiver of jury trial and other rights under the Older Workers Benefit Protection Act.

Those and similar issues appear to be headed for the

United States Supreme Court as indicated in the decision for the United States Court of Appeals for the Seventh Circuit, dated March 20, 1997, Pryner v. Tractor Supply Company, et al., _ F.3d __, 1997 U.S. App. LEXIS 5299 at *37 (7th Cir. March 20, 1997).

The petition for a writ of mandamus complies with the criteria set forth in In re Hooker Investments, Inc., 937 F.2d 833, 837 (2d Cir. 1991), and therefore should be granted.

WHEREFORE, if the Court determines, contrary to petitioner's argument in the Memorandum of Law submitted herewith, that the appeal should be dismissed for lack of jurisdiction, the petition for a writ of mandamus should be considered and granted.

Dated: New York, New York
April 1, 1997

Respectfully submitted,
/s/

Arthur M. Wisehart (AMW 4003)

WISEHART & KOCH
19 W. 44th Street - Suite 412
New York, New York 10036
(212) 730-0044
Attorneys for Petitioner/
Plaintiff-Appellant
Anthony DeMeo

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
--------------------------------x

	No.
In re ANTHONY DE MEO, Petitioner ,	
----------------------------------x	
ANTHONY DE MEO Plaintiff-Appellant, -against- SMITH BARNEY INC., THE TRAVELERS INC., and TONI ELLIOTT. Defendants-Appellees.	Docket No. 96-9640 AFFIDAVIT IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL AND IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS ON BEHALF OF PLAINTIFF-APPELLANT
---------------------------------x	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARTHUR M. WISEHART, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, and the senior attorney of the law firm of WISEHART & KOCH, attorneys for the plaintiff-appellant, Anthony DeMeo.

2. This affidavit is respectfully submitted in opposition to the motion to dismiss on behalf of defendants-appellees dated February 28, 1997, and in support of the

petition for a writ of mandamus dated April 1, 1997, that is submitted on behalf of plaintiff-appellant DeMeo, in the alternative, should the motion to dismiss the appeal be granted for lack of jurisdiction.

3. As a preliminary matter, denial of the motion to dismiss is requested on procedural grounds. The jurisdictional issue raised by the motion is inextricably intertwined with the merits of the appeal. It is not possible to do justice to the complex and novel issues raised by the motion to dismiss in the abbreviated procedure required with regard to such motions.

4. The motion to dismiss therefore should be denied so that the issues raised can be determined appropriately in the customary manner on the basis of the full record, briefs and oral argument.

5. The decision of the District Court, by Kimba M. Wood, U.S.D.J., United States District Court for the Southern District of New York, dated December 2, 1996, annexed hereto as Exhibit 1, was decided solely on the basis of the affidavits annexed hereto with Exhibit 3, 5 and 6.

6. The complaint filed in this action is annexed hereto as Exhibit 2.

7. Exhibit 3 annexed hereto is the affidavit of Anthony DeMeo, plaintiff-appellant, sworn to June 10, 1996.

8. The affidavit of Mr. DeMeo shows that disputed issues of fact were raised by plaintiff-appellant in the District Court regarding the following matters:

(a) Whether the purported application of Mr. DeMeo on Form RE-1 dated June 20, 1972, was ever completed (DeMeo Aff. ¶¶ 5-14);

(b) Whether instead of completing the processing of the application, the New York Stock Exchange had closed its files on the matter in 1972 as a result of which the terms thereof did not ever become effective (DeMeo Aff. ¶¶ 15-26);

(c) Whether the application form is applicable in any event to the claims stated herein (DeMeo Aff. ¶¶ 27-36);

(d) Whether the application form is inapplicable for the further reason that it is obsolete and has been abandoned by the New York Stock Exchange (DeMeo Aff. ¶¶ 37-52);

(e) Whether the application form covers within its scope the age discrimination claims that are the subject of this lawsuit (DeMeo Aff. ¶¶ 53-55);

(f) Whether said application form does not apply to all of the defendants (DeMeo Aff. ¶¶ 57-59);

(g) Whether Mr. DeMeo waived his jury trial/federal court rights, or instead specifically declined to do so (DeMeo Aff. ¶¶ 60-65);

(h) Whether Mr. DeMeo's former employer, Smith Barney, was a party to the form application, or was not covered by it, and whether there was no consideration with respect to said form application (DeMeo Aff. ¶¶ 66-70);

(i) Whether Mr. DeMeo at any time executed a "knowing and voluntary" consent to arbitrate his age discrimination claims (DeMeo Aff. ¶¶ 71-74);

(j) Whether the purported agreement with revisions in the form application that would be made in the future, or the rules and regulations thereto, no matter what future changes might be made, constitute a "written" arbitration agreement at the time it purportedly was signed within the meaning of the Federal Arbitration Act, 9 U.S.C. § 4 (DeMeo ¶¶ 75-84).

9. Annexed hereto as Exhibit 4 is the cross-motion presented on behalf of Mr. DeMeo for an Order "pursuant to (A) Section 4 of the Federal Arbitration Act (9 U.S.C. § 4) requiring that a jury trial be held (1) on the issue raised by plaintiff's denial of the existence of a written agreement for arbitration of the subject matter of the suit herein arising out of the controversy between the parties, and (2) on the further issue under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) raised by plaintiff's claim that there was no knowing and voluntary waiver by plaintiff of his right to have his age discrimination claim arising under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), and for the remedies thereunder provided be determined by a Federal Court and jury pursuant to 29 U.S.C. §§ 626(b) and 626(c), (B) Rule 59(e) of the Federal Rules of Civil Procedure, altering or amending the provisions in the Order dated March 7, 1996, denying additional discovery needed for the hearings requested in subdivision (A) above, and (C) Rule 56(f) granting plaintiff additional discovery that is necessary to respond to defendants' motion to compel arbitration, and such other and further relief as to this Court may seem just and proper, including attorney's fees and costs."

10. Annexed hereto as Exhibit 5 is defendants' notice of motion to compel arbitration and stay litigation dated November 2, 1995, and supporting affidavits filed in the District Court.

11. Annexed hereto as Exhibit 6 is the Affidavit of Linda Schaffer in Further Support of Defendant's [sic] Motion to Compel Arbitration and Stay Litigation sworn to June 28, 1996, which is not based on personal knowledge and itself showing, by reliance upon largely illegible and incomprehensible computer entries, about which she knew little or nothing, plaintiff's need of further discovery in the proceedings in the District Court.

12. The importance of the public policy debate on the issues presented by this appeal is indicated by the fact that last Saturday, March 22, 1997, such issues were debated in the 21st Annual Robert F. Wagner, Sr., National Labor Law Moot Court Competition at the United States Supreme Court level at New York Law School, in which the undersigned participated as a Justice.

13. Such important issues of first impression also are being litigated in a number of cases around the country in which the Equal Employment Opportunity Commission has taken the position that such compulsory arbitration agreements should be held to be unenforceable on public policy grounds. See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC); EEOC v. River Oaks Imaging & Diagnostic, Civ. A. H-95-75 (S.D. Tex.); EEOC v. Midland Food Services, LLC, No. 1:96-MC-107 (N.D. Ohio); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-cv-107 (D. Minn.) (amicus brief filed by EEOC); Pierre Levy, Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights, 26 N.M. L.

REV. 455, 478 n.193 (1996), describing the EEOC's objections to such compulsory arbitration proceedings.

WHEREFORE, the motion to dismiss dated February 28, 1997, should be denied, or in the alternative the petition for a writ of mandamus on behalf of plaintiff-appellant should be granted.

Respectfully submitted,

/s/
Arthur M. Wisehart (AMW 4003)

WISEHART & KOCH
19 W. 44th Street - Suite 412
New York, New York 10036
(212) 730-0044

Attorneys for Plaintiff-Appellant/
Petitioner

Sworn to before me this

1st day of April 1997:

/s/ Joan Lipin
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------------------------------x

ANTHONY DE MEO	95 Civ.
Plaintiff	
-against-	COMPLAINT
SMITH BARNEY INC., THE TRAVELERS INC., and TONI ELLIOTT.	PLAINTIFF DEMANDS TRIAL BY JURY
Defendants	

----------------------------------x

Plaintiff, by his attorneys WISEHART & KOCH, for his Complaint against defendants, alleges and states:

Jurisdiction and Venue

1. This Court has subject matter jurisdiction under Section 623 of the Age Discrimination in Employment Act, made applicable by Section 626(c) of said Act, 29 U.S.C.§§ 623, 626(c), 630(b), pursuant to 28 U.S.C. §§ 1331, 1337, and 1343(a)(4) and under the doctrine of supplemental and pendent jurisdiction.

2. Jurisdiction also exists under diversity of citizenship.

3. Plaintiff Anthony DeMeo is a citizen and resident of the State of New Jersey.

4. Defendant Smith Barney Inc. ("Smith Barney") has its principal place of business in, and is a citizen of the State of

New York for diversity of citizenship purposes, and not a citizen of the State of New Jersey.

5. Defendant The Travelers Inc. has its principal place of business in, and is a citizen of the State of New York for diversity of citizenship purposes, and not a citizen of the State of New Jersey.

6. Smith Barney is a subsidiary corporation owned and controlled by The Travelers Inc. The Travelers Inc. aided and abetted the other defendants in the unlawful discriminatory practices alleged herein.

7. Defendant Toni Elliott was and is an Executive Vice President of Smith Barney and a citizen and resident of the State of New York.

8. The amount in controversy exceeds $50,000 exclusive of interest and costs.

9. Venue exists in the Southern District of New York under 28 U.S.C. § 1391(b) and (c) in that the events or omissions giving rise to the claim occurred in the Southern District of New York, and all defendants maintain offices or reside in the Southern District of New York.

The Employment of Plaintiff

10. Plaintiff was employed by a corporate predecessor of defendants in 1968.

11. Plaintiff thereupon entered upon a career with defendants and their predecessors which led to a continuing series of promotions to positions of higher responsibility until he became Senior Vice President of Marketing of Smith Barney.

12. Plaintiff was and is competent and fully qualified to perform the responsibilities of his position.

VIOLATION OF THE AGE DISCRIMINATION LAWS

13. Plaintiff's date of birth is March 4, 1947. He is 48 years old.

14. On or about August 21, 1994, defendants terminated plaintiff.

15. Plaintiff was told of such termination by Toni Elliott, who was plaintiff's supervisor.

16. Such termination was contrary to assurances previously given to, and relied upon by Mr. DeMeo in accepting new assignments that he would not be terminated except for just cause in view of his years of service, experience and outstanding achievements of extraordinary benefit to the company and its predecessors, and constituting additional consideration for his employment agreement.

17. Plaintiff would have been promoted to Executive Vice President in view of his responsibilities, qualifications and achievements but for defendants' invidious discrimination against him as an older employee.

18. Because of plaintiff's age, defendants did not promote him, and took actions to downgrade and humiliate plaintiff within the corporate structure with the purpose and intent of causing or compelling him to leave because of his age.

19. Defendants' purpose and intent were to discriminate against plaintiff and other older employees in favor of younger employees in their 20s and 30s to whom plaintiff's functions

were assigned, but who lacked the ability and experience to perform such functions as well as plaintiff.

20. Said actions were in furtherance of a scheme instigated by defendants to replace plaintiff with younger, relatively inexperienced personnel.

21. Three other employees were terminated on the same day as plaintiff. Each employee was over 50 years of age and had over 25 years employment with the firm.

22. The plan and purpose of defendants were to eliminate older executives and to replace them with younger personnel.

23. Plaintiff at all times performed his duties in a devoted and trustworthy manner which exceeded the requirements of his position.

24. Plaintiff's qualifications equaled or exceeded those required for his position.

25. Plaintiff was at the peak of his professional proficiency at the time of his termination.

26. Plaintiff's qualifications and value significantly exceed those of a number of the other Smith Barney employees as represented particularly by the younger, more recent additions to the staff who were not terminated, and who were assigned plaintiff's functions and promoted.

27. Plaintiff received repeated commendations for his performance throughout his employment. His qualifications substantially exceeded those of Toni Elliott, although she was his supervisor, and those of Jay Mendelbaum, her supervisor, although he was in his early 30's with little experience in the

company or industry, or that was relevant to his position.

28. Plaintiff's qualifications significantly exceed those of a number of much younger employees who were not terminated. Jay Mendelbaum, in his 30's was moved into plaintiff's office while plaintiff was shunted off into another location as a way of humiliating him in the eyes of the rest of the staff. Following plaintiff's termination, Mendelbaum was put in charge of Marketing, about which he knew very little in comparison with plaintiff.

29. Defendants' acts as alleged above are caused by defendants' intentional age discrimination against plaintiff, and also by defendants' purpose and intent to retaliate against plaintiff because of his objections concerning the discriminatory treatment of other older employees, especially his own secretary.

30. Plaintiff is well known as a leading senior executive in the securities industry. As defendants knew and intended, knowledge of plaintiff's humiliating termination has created a stigma that has permanently and irreparably injured his professional reputation in the securities industry.

31. Defendants' acts as alleged above constitute lawful age discrimination and retaliation causing injury to plaintiff.

32. Defendants have injured and will continue to cause injury to plaintiff's professional reputation in the securities industry (a) by referring to plaintiff and other older employees as "dinosaurs" whose knowledge, abilities and skills are outmoded, old fashioned or obsolete, (b) by falsely stating that plaintiff has a "lousy work ethic," and (c) by falsely stating that plaintiff's work performance was inadequate or deficient.

33. Defendants have caused further injury to plaintiff

by falsely and unfairly publishing, discrediting and impugning his performance as an employee to others in the securities industry and community, and intend to continue to do so in retaliation for plaintiff's objections to their discriminatory and unlawful conduct.

34. Defendants follow a pattern or practice of discriminating against older personnel by creating a hostile work environment by the adverse and disparate treatment of them compared with their treatment of younger employees.

35. Because of the pervasiveness of age discrimination in the securities industry, and at Smith Barney, it is impossible for older employees to obtain comparable employment either from within the company, or in another securities firm, whereas younger applicants and employees of lesser qualifications are able to obtain positions at the same time that older employees qualified for those positions are being terminated.

36. Defendants' actions as alleged above were in furtherance of a continuing strategy of harassment and abusive, intolerable and discriminatory treatment by defendants intended to force plaintiff and other qualified older employees out of their positions, to victimize them by reducing their relative compensation and by adversely altering their other terms and conditions of employment, so as to humiliate and demean them in their trade or profession as executives in the company and in the securities industry.

37. Said actions constitute invidious acts of age discrimination by defendants against plaintiff and other older employees as a class.

38. Defendants' acts of age discrimination against plaintiff were wanton, willful and intentional, and in reckless disregard for the rights of plaintiff and others similarly situated.

39. Plaintiff duly filed a discrimination charge with the United States Equal Employment Opportunity Commission on March 22, 1995, and requested that agency to file said charge with the New York State Division of Human Rights.

40. It is anticipated that the New York state Division of Human Rights will dismiss said charge under the New York Human Rights Law on grounds of administrative convenience upon the commencement of this action in accordance with its procedure and practice.

41. Plaintiff has duly complied with the pre-filing requirements under the Human Rights Law of the City of New York.

42. As a result of defendants' unlawful conduct plaintiff has suffered a loss of compensation for his worklife expectancy in the amount of approximately $4,600,000 or such other and greater amount as shall be proved at trial plus an additional amount of $2,300,000 for lost promotions to which plaintiff would be entitled but for age discrimination.

43. Defendants' discriminatory acts were in willful violation of the Age Discrimination in Employment Act, and liquidated or double damages are requested.

44. In addition plaintiff requests compensatory damages as set forth below.

45. The injury to plaintiff's reputation and standing and injury to his good will in plaintiff's profession caused by defendants' acts is in the amount of $5,000,000.

46. Defendants' acts have caused personal injury to plaintiff, impairment of his health, pain and suffering, mental and physical anguish, emotional distress, and humiliation as a

professional in advanced computerized systems for portfolio analysis and financial planning, and as a marketing expert and manager, and additional damages therefor in the amount of $5,000,000 are requested.

47. The value to defendants of the new and improved MIS programs utilizing advanced computer technology that defendants have misappropriated from plaintiff by his termination represents a substantial business advantage, and plaintiff requests $12,000,000 in compensatory damages for the unjust enrichment of defendants caused by their unlawful acts intended by defendants to exploit and unjustly enrich themselves by appropriating the inventions, skills and knowledge of plaintiff while they maneuvered him into a position to perpetrate and implement their unlawful discriminatory purpose, and were contrary to the false representations and assurances previously made by defendants to plaintiff at the time he was requested to perform other assignments.

48. Said discriminatory acts of defendants also are violative of the Human Rights Law of the City of New York, N.Y.C. Admin. Code Section 8-107.

49. Plaintiff is a person aggrieved by unlawful discriminatory practices perpetrated by defendants and entitled to commence a civil action pursuant to Section 8-502 of the amended Human Rights Law of the City of New York for the judicial remedies provided thereunder.

50. Defendants' unlawful acts causing injury to plaintiff were willful and wanton, committed with personal malice and hostile animus toward plaintiff and other older employees considered by defendants to be non-productive "dinosaurs," in deliberate violation of law and public policy, and/or reckless disregard for the rights of plaintiff and other older personnel.

51. Punitive or exemplary damages are requested in the amount of $15,000,000, or such greater amount as shall be required, in light of defendants' income and assets, and the value of the benefits that plaintiff has conferred upon defendants without receiving recognition or additional compensation therefore, to deter each defendant, and those who may be induced to collude and conspire with them, from engaging in such reprehensible conduct in the future.

52. Plaintiff also requests compensatory damages as provided in Section 297(9) of the New York Human Rights Law for the injuries resulting from said discriminatory acts, including damages for loss of earnings and benefits for his work life expectancy, injury to his professional standing, loss of good will, personal injury and impairment of health, and pain and suffering, as set forth above.

WHEREFORE, judgment against the defendants, jointly and severally, providing the following relief is requested on behalf of plaintiff:

(a) Damages of $6,900,000 for lost earnings, or such additional amount as shall be proved at trial, and prejudgment interest thereon;

(b) The doubling of the above amount as liquidated damages for defendants' willful discriminatory acts in violation of the Age Discrimination in Employment Act;

(c) Damages for personal injury to plaintiff including impairment of health, pain and suffering, mental and physical anguish, emotional distress, and humiliation in the amount of $5,000,000;

(d) Damages for injury to plaintiff's reputation and standing and injury to his good will in the amount of $5,000,000;

(e) Damages in the amount of $12,000,000 for the unjust enrichment of defendants by the value of advanced MIS programs developed by plaintiff and misappropriated by defendants;

(f) Punitive damages in the amount of $15,000,000, or such additional amount as shall be required, in light of defendants income and assets, to deter them from engaging in such reprehensible conduct in the future;

(g) Together with prejudgment interest, and reasonable allowances for plaintiff's attorney's fees, costs and litigation expenses, and such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
August 1, 1995

WISEHART & KOCH

/s/
Arthur M. Wisehart (AMW 4003)

19 West 43rd Street
Suite 412
New York, New York 10036
(212) 730-0044
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------------------------------x
ANTHONY DE MEO 95 Civ. 5791 (KMW)

Plaintiff

-against- AFFIDAVIT OF
ANTHONY DE MEO

SMITH BARNEY INC.,
THE TRAVELERS INC.,
and TONI ELLIOTT.

Defendants
----------------------------------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ANTHONY DE MEO, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. This affidavit is respectfully submitted in opposition to defendants' motion to compel arbitration.

3. As shown below, the purported Form RE-1 relied on by defendants is not a written agreement that applies to the subject matter of this litigation. Further, the purported Form RE-1 is without force and effect, and did not constitute a knowing and voluntary waiver of my rights and remedies to be determined by a Federal Court and jury, and the granting of defendants' motion to compel arbitration will cause me irreparable injury.

A. THE PURPORTED FORM RE-1 IS WITHOUT FORCE AND EFFECT

4. I began my career in the securities industry with Hayden, Stone, Inc. in 1966.

5. In 1972, in preparation for the position of Administrative Manager of a Hayden, Stone office, I was required to take certain examinations and received preparation in the form of a cram course for that purpose conducted under the direction of Leo Fleur for a four-week period.

6. Mr. Fleur stated to me that, during the four-week period, "everything is meant to get you through the exam; none of this will have any practical application."

7. Such statements by Mr. Fleur also referred to any documents that I was required to sign.

8. The examinations that I took following the preparatory course solely concerned practices in the trading of securities and practices to be followed in dealing with customers in the process.

9. I have no recollection of signing the Form RE-1 a copy of which is annexed hereto as Exhibit A. I have requested that the original document be produced for my examination but it has not been.

10. The Form RE-1 refers to my position as Administrative Manager of CBWL-Hayden, Stone,Inc. However, registration was not required for that position.

11. At no time have I been required to be a registered representative of the NYSE.

12. Further, it is my understanding that it is the practice of the NYSE to notify applicants that they have been approved of for registration after the process has been completed.

13. I have never been so notified, and in fact, the documents produced be the NYSE in response to my discovery requests in this litigation from my file do not indicate that I ever was so approved.

14. The application in the Form RE-1 therefore was never completed and it never became applicable to me.

15. Moreover, since 1972, my employment has changed a minimum of seven times, and my job responsibilities changed a minimum of nine times as indicated in Exhibit B annexed hereto.

16. My successors and predecessors in the management positions I held after leaving CBWL-Hayden, Stone were not required to be registered.

17. Rolf Wetjen, my immediate successor to the position of the Director of General Services, was not required to be registered. Bonnie Brogdan, the current Director of General Services at Lehman Brothers is not registered and there is no requirement that she be registered.

18. My successor as Director of Marketing, Jay Mandelbaum's job requirements never included duties and responsibilities that necessitated registration. Mandelbaum joined Smith Barney from the consulting firm McKinsey & Co. where he had no background in the brokerage industry and was not required to be registered in his former employment.

19. The Form RE-1 annexed hereto as Exhibit A was

used for the limited purpose of my taking certain examinations administered by the New York Stock Exchange ("NYSE").

20. I do not recall ever having been told that the registration or application process had been completed.

21. On the contrary I was specifically told at the time by Anthony Fedele, my immediate supervisor, that I would not be required to become a Registered Representative.

22. This is corroborated by a letter dated October 23, 1972, from the NYSE to Lester DeMott of Hayden Stone, Inc. which refers to the purported application and states that the NYSE was "closing our files" on my application. (Exhibit C annexed hereto.)

23. The letter further states that at some later date the NYSE "would be happy to reopen the file and continue processing the application" if a request should be made.

24. No such request was ever made to my knowledge.

25. The Form RE-1, annexed hereto as Exhibit A, states specifically in paragraph 31 that subparagraph (j) thereof would become applicable as an agreement only "in consideration of the New York Stock Exchanges, Inc.'s approving this application. . . ."

26. As shown by is file produced in discovery herein, the NYSE never approved the application. Accordingly, paragraph 31 never becameeffective, and does not constitute an agreement to arbitrate by me.

B. THE PURPORTED FORM RE-1 IS NOT A WRITTEN AGREEMENT THAT APPLIES TO THE SUBJECT MATTER OF THIS LITIGATION

27. I unequivocally deny that the Form RE-1 application purportedly signed on June 20, 1972, is a written agreement for the arbitration of the age discrimination claims that I have asserted in this litigation.

28. Paragraph 31(j) is limited to "controversy."

29. I did not at any time ever agree to arbitrate "claims" such as those that are involved in this litigation.

30. I did not even know that there were such things as age discrimination claims in 1972.

31. My understanding of the "controversy" referred to in paragraph 31(j) is that it is limited to matters involving practices with respect to the trading of securities for customers.

32. However, in all of my years in securities field, I never traded any securities for customers, and I did not ever receive any commissions for doing so.

33. My understanding that paragraph 31(j) is limited to controversies involving the trading of securities and related matters is supported by the context in which it is found. It is located between paragraphs 31(i) and 31(k).

34. Paragraph 31(i) states that an applicant agrees to notify the member organization if they become the subject of any securities investigation or disciplinary action, litigation concerning securities industry, allegations inconsistent with equitable principles of trade as well as other such actions

concerning the practices of the Exchange and securities and trade industry.

35. Paragraph 31(k) states that the applicant agrees to submit to investigative procedures up to 90 days after notice of termination concerning any matters that during the time of employment the applicant did not conform with the NYSE Constitution and Rules or the practices of the Exchange and would accept any disciplinary actions or penalties if warranted.

36. Form RE-1, paragraph 31(j), is limited to the arbitration of "controversies" and does not in any way state that "claims" relating to age discrimination are subject to arbitration. Nor does it state that any "claim" in general is subject to arbitration.

C. THE PURPORTED FORM RE-1 HAS EXPIRED

37. During the process of discovery, the National Association of Securities Dealers, Inc., produced the Record from its Central Registration Depository ("CRD") pertaining to me that is set forth in Exhibit D annexed hereto.

38. The entries in the CRD indicate that the purported Form RE-1 that is relied upon by defendants therefore was superseded by subsequent events, and no longer is applicable.

39. In particular, I call the Court's attention to the following "terminations" that are noted on the CRD:

9/07/94
7/31/93
11/22/77
11/17/76
11/08/74
10/26/73

40. No Form RE-1 registration for me is listed on the CRD. This corroborates my statement above that action with reference to my registration was never completed by the NYSE.

41. Use of the Form RE-1 was discontinued by the NYSE in the period between 1976 and 1978 as shown in Exhibits E and F annexed hereto. It was superseded by the Form U-4 used by the National Association of Securities Dealers.

42. However, I never signed the Form U-4, nor did I authorize anyone to do so on my behalf.

43. Further, I was never advised that I was registered thereunder.

44. None of the information on the CRD provided by the National Association of Securities Dealers was provided to me, nor did I authorize any of the actions taken in the entries listed thereon.

45. We requested any documents relating to such computerized information listed on the CRD be produced by defendants as shown in Exhibit G annexed hereto.

46. However, defendants have produced no such documents. Moreover, defendants have represented that there are no other such documents in a letter dated March 18, 1996 (Exhibit H annexed hereto).

47. I am informed that the National Association of Securities Dealers has no documents to support such entries (Exhibit I annexed hereto).

48. Thus, if there ever were such documents, they have been destroyed by defendants or their predecessors.

49. The computer entries in the CRD deal with matters and purported actions that I never knew of, was never informed about, and never authorized or approved. In addition, the entries computerized on the CRD include very serious mistakes concerning my employment history in the information entered by some unknown person or persons as shown below:

a. The CRD lists my employment with two separate companies in overlapping time periods: Shearson Lehman Hutton Inc. from 11/22/77 to 7/31/90 and then Shearson Lehman Brothers Inc. from 11/22/77 to 7/31/90.

b. The entries for both Shearson Lehman Hutton Inc. and Shearson Lehman Brothers Inc. are incorrect as evidenced by my resume annexed hereto as Exhibit B. As indicated on my resume, my employment history during the years 1976 to 1993 is as follows:

Jan 1976 - Dec 1979: Shearson Hayden Stone Inc.;
Dec 1979 - June 1981: Shearson Loeb Rhoades Inc.;
June 1981 - April 1984: Shearson American Express Inc.;
April 1984 - May 1985: Shearson Lehman American Express;
May 1985 - May 1988: Shearson Lehman Brothers Inc.;

May 1988 - June 1990:
Shearson Lehman Hutton, Inc.;
June 1990 - July 1993:
Shearson Lehman Brothers Inc.

50. Further, the CRD indicates that at some point there were multiple Form U-4 "conversion" filings. Conversion filings are listed as follows:

10/16/93
10/20/92
3/04/91
4/27/85
8/15/84
6/13/81

51. I never agreed to or authorized any such conversion filing and I never signed a Form U-4. Nor did the CRD, NASD or NYSE notify me through the issuance of statements, or any other means, that they were making such filings. Thus it was impossible for me to consent to whatever the forms stated, and I did not.

52. In addition, such the entry of such "conversion" filings shows that the RE-1 was not regarded by defendants as having any force and effect.

53. Since I did not ever sign a Form U-4, I have never consented to the terms of such Form.

54. I unequivocally deny that I ever entered into a written agreement for arbitration with respect to the age discrimination claims that are the subject of this lawsuit.

55. I unequivocally deny that the Form RE-1 application I purportedly signed on June 20, 1972 is a written

agreement for the arbitration of the age discrimination claims that I have in this case.

56. I never authorized any annual registration fee to be paid on my behalf, nor was I ever asked for such authority.

57. The Form RE-1 is not applicable to defendants The Travelers Inc. and Toni Elliott, neither of whom is a member, organization, affiliate or subsidiary of Smith Barney Inc. according to the NYSE Constitution and Rules.

58. The Travelers Inc. is a corporation that primarily deals in insurance and according to the NYSE Constitution and Rules is not a member or member organization nor are they a subsidiary or affiliate thereof.

59. Toni Elliott was not required to be a registered representative given the nature of her duties. Toni Elliott knew little of anything about being a stockbroker and did not have any trading responsibilities in her position.

D. THE FORM RE-1 WAS NOT A KNOWING AND VOLUNTARY WAIVER OF MY RIGHTS TO A JUDICIAL REMEDY TO BE DETERMINED BY A FEDERAL COURT AND JURY

60. There was never any knowing or voluntary agreement by me to arbitrate the dispute that underlies the claims pleaded in my complaint in this action (Exhibit J annexed hereto).

61. I never had any understanding that such disputes would be arbitrated, nor would I waive my jury trial rights to any such arbitration under the rules of the New York Stock Exchange because the arbitrators used are biased in favor of management of firms in the securities industry, and are unable

to provide the same remedies as may be obtained in judicial proceedings.

62. In fact I specifically declined to sign the Settlement and General Release dated August 24, 1994, containing an arbitration clause that was requested by Smith Barney in connection with my termination (Exhibit K annexed hereto).

63. The Form RE-1 document dated June 20, 1972, that is annexed to the affidavit of Eugene V. Clark, Esq., Senior Vice President and Associate General Counsel of defendant Smith Barney Inc., to the best of my knowledge, information and belief, is not contained within or a part of my personnel file or employment agreement with Smith Barney Inc., but is a document that never became effective and furthermore has expired or has been canceled, superseded, revoked or lapsed due to subsequent events.

64. The document annexed to the Clark affidavit was destroyed, revoked or lapsed, or became ineffective long before my employment by Smith Barney.

65. Upon my request, when my personnel file at Smith Barney was given to me approximately six months ago for my examination, and document was not part of the file.

66. Smith Barney is not a successor in interest with regard to my employment at CBWL-Hayden, Stone.

67. Moreover, there was never any understanding or agreement relating to arbitration that applies to the position I held with Smith Barney-prior to my termination.

68. Further, said document was never required for or had any application to the duties I performed at Smith Barney.

69. The terms of the abandoned and expired form have no application to my performance of executive-level management responsibilities for other firms. Smith Barney is not a party to the abandoned Form, nor is it a successor in interest of CBWL-Hayden, Stone Inc. Defendants have no rights under the document for the further reason that there is no privity of contract. Based upon the information available to me, the business that was CBWL-Hayden, Stone Inc. is now part of the assets of Lehman Brothers, Inc., which is now an independent public company without any connection to Smith Barney, Inc. Thus Smith Barney is without standing to assert a claim under said document.

70. Further, there is no consideration for the application of said document or registration thereunder to my employment at Smith Barney as it was not required as a condition of my employment at that firm. It therefore is null and void, and without force and effect.

E. NO WAIVER OF RIGHTS OCCURRED

71. I did not at any time have a "knowing and voluntary agreement" to arbitrate a dispute involving such conduct of defendants as was both unlawful and contrary to strong public policy expressed in Federal, State and New York City Age Discrimination and Human Rights Laws, on matters involving personnel and practices that were in no way involved with my employment at CBWL-Hayden, Stone Inc.

72. Defendants' motion should be denied as an unlawful attempt to impose compulsory arbitration upon me in violation of my statutory and constitutional jury trial and due process rights.

73. The Form RE-1 relied on by defendants also has

no application to defendants The Travelers Inc. and Toni Elliott, neither of whom signed it or is either a member of the New York Stock Exchange nor is either an organization, affiliate or subsidiary of Smith Barney in its capacity as a member.

74. Arbitration of my claims involved in this litigation would violate my jury trial and due process rights under Federal and State laws, and cause irreparable injury to me.

75. The Form RE-1 that was purportedly signed 22 years before I was terminated stated in provision 30(d) (Exhibit A attached hereto) that I had read the NYSE Constitution and Rules and agreed to abide by them and their subsequent amendments and provisions. Paragraph 30(j), the clause discussing arbitration, purportedly states that I will abide by the arbitration procedures in the NYSE Constitution and Rules. Such a clause amounts to a coercive tactic by the NYSE to myself as well as all others similarly situated intended to obtain under false pretenses our purported consent to a provision that the NYSE makes it impossible to agree with because of the complexity and multitude of its rules and regulations.

76. The NYSE Constitution and Rules as evidenced by the representative index, Exhibit L attached hereto, are extremely voluminous, detailed and complex. Thus, they are impossible to fully comprehend without months, if not a year, of continuous study.

77. However, the bureaucracy of the NYSE makes such study impossible. According to the NYSE, the only set of volumes available to the NYSE are the ones located at the General Counsel's office, even though thousands registered representative applications are filled out every year. The NYSE requires that the RE-1 and U-4 are to be filled out as soon as possible so that the NYSE's investigation or examination of the

applicant is completed even before the applicant completes his training a period that itself may take months.

78. Thus, the NYSE deliberately and consciously demands the impossible, that an applicant fully comprehend a large volume containing highly technical language in a very limited amount of time as found in books and records that are not available, and be coerced into purporting to agree with conditions that by their nature are impossible on pain of otherwise being subjected to denial of a livelihood.

79. The NYSE demands the further impossibility that applicants agree to any and all amendments that may be made at any time in the future, sight unseen.

80. The only possible means that I would have even to become aware of such amendments would be to take it upon myself and sift through the Constitution and Rules every year and compare them to the last edition for changes. The information memos sent out by the NYSE concerning amendments are to the members and member organizations only, which I am not.

81. It is further impossible for applicants to be aware of every provision in the Constitution and Rules since they would be unaware of amendments that took place after the current NYSE Constitution and Rules was published and before the publication of the next edition containing the new amendments.

82. Thus, I unequivocally did not voluntarily or knowingly enter into any agreement, let alone a written agreement to arbitrate a claim based on a discriminatory reduction in force by another employer occurring more than 20 years in the future.

83. I am informed that the Form RE-1 amounts to a contract of adhesion, I am advised that all ambiguities therein would be required to be construed in my favor.

84. Furthermore, assuming that one is able to read and comprehend the Constitution and Rules in the fashion required by the NYSE, then I still would not be forced to arbitrate my claim because the respective arbitration clauses of the RE-1 and the Constitution at the time of the RE-1 contradict one another and thus completely defied either understanding or agreement.

85. At the date of the purported Form RE-1, the NYSE Constitution stated that any controversy between a member and a non-member would be arbitrated only at the instance of any such non-member, which I am according to the NYSE Constitution and Rules. (Exhibit M annexed hereto). Thus, members such as Smith Barney have no standing to initiate arbitration thereunder as it here seeks to do.

F. ADDITIONAL DISCOVERY IS REQUIRED IN THE INTEREST OF JUSTICE

86. The denial of additional discovery because the New York Stock Exchange ("NYSE") asserted that the motion to compel arbitration pertains only to "a very small subset" of the twenty-seven volumes of the Constitution and Rules of the NYSE and that those sections are "readily identifiable from the index in each edition" is incorrect.

87. The motion to compel arbitration pertains to much more than "a very small subset" of these volumes. As represented by the sample index Exhibit L attached hereto these volumes contain a large quantity of information and the information we seek within these large volumes is anything but "a very small subset." To illustrate our frustration in trying to examine the portions of the volumes we believe pertain to the

motion to compel arbitration reference is made to the sections on "arbitration," "fees," "forms," "employees," "member organizations," "registration," and "representatives" among others appear to be relevant.

88. In addition, much of the information we are seeking is not "readily identifiable from the index of each edition." There is absolutely no reference in the indices to "Form RE-1," "Form U-4," "affiliates," "fees for officers," "lapse of registration" and a great deal of other matters that are integral to opposing the motion to compel arbitration. Some of these key points have thus only become discoverable through the difficult and lengthy task of sifting through the cumbersome volumes themselves while other key points have remained uncovered. Added to this difficulty is that the indices do not remain consistent throughout the years.

89. Moreover, once one does find a section that is relevant, it is necessary to examine the preceding and subsequent editions to see what was amended. The Constitution and Rules note when a particular provision was amended but in no way indicates what in the provision was amended. Therefore, one must read a provision before it was amended and compare that to a provision after it was amended. There may be as many as eleven amendments to a single provision as noted in Rule 345.13 Exhibit N annexed hereto.

90. These amendments vary on the size of the provision being altered. Certain provisions have one key word amended as evidenced in Article VIII Sec. 1 ¶ 1351 in Exhibits M and O annexed hereto while other provisions have numerous paragraphs being added, deleted and altered. Some provisions have even been altered without mention of when or what was being amended at all, such as the abandonment of Form RE-1 and its replacement by the inconsistent provisions of Form U-4, making discovery of such changes an impossibility.

91. The NYSE has stated that the only volumes it has date back only to May, 1972, and it is thus impossible to find out what relevant portions of the Constitution and Rules stated prior to May, 1972, or the explanation given when the Form RE-1 was initially adopted.

G. THE GRANTING OF DEFENDANTS' MOTION TO COMPEL ARBITRATION WOULD CAUSE IRREPARABLE INJURY

92. I am advised that the Federal Arbitration Act was adopted in 1925, long before the Age Discrimination in Employment Act of 1967 was even thought about.

93. The purpose of the Federal Arbitration Act was to protect persons who could not afford the costs of litigation and lawyers by providing a fast, inexpensive remedy for run of the mill business-type disputes involving settled and understood trade practices.

94. However, the securities industry has transmogrified arbitration from a procedure available for a small person without resources into a lethal weapon administered by a biased entity, the NYSE, that is used by huge securities firms to retaliate against and obstruct the ability of former employees who raise substantial questions with regard to their rights to be protected from age discrimination and civil rights violations to obtain a fair determination of their rights and remedies.

95. In my case, the purported Form RE-1 was required as a part of my contract of employment with another company many years before my employment by Smith Barney and had no application at all with respect to the duties as I performed at Smith Barney.

96. No registration with the New York Stock Exchange is required for the management positions such as I held at Smith Barney and predecessor firms.

H. THE ARBITRATION PROCEDURE HAS BEEN DELIBERATELY USED BY THE SECURITIES INDUSTRY TO PERPETUATE AGE DISCRIMINATION

97. The fact that the arbitration procedure has been used by the securities industry in order to obstruct the application of the laws against age discrimination and civil rights violations is indicated by the continuing widespread existence of such unlawful practices in the securities industry, to my own personal knowledge.

98. It is commonplace in the securities industry to refer to persons over age 45 as "dinosaurs," as an indication of the bias that exists against such persons, and the belief that they are obsolete and unable to be productive members of the workforce in that industry despite their years of training and experience.

99. The pattern and practice of age discrimination persists in the securities industry despite the fact that such activities have now been declared to be unlawful for many years largely because the arbitration procedure has been used by the securities firms to obstruct and largely nullify the enforcement procedures and remedies available in Federal Court actions made available by law to victims of such misconduct in the securities industry.

100. The existence of the pattern or practice of age discrimination in the securities industry is based upon my direct knowledge and observations as an officer or top official in a number of large securities firms over the past twenty or more years.

101. Smith Barney has exemplified this pattern or practice and the number of executives not forced to leave on one pretext or another after reaching the age range of 45-50 in that firm is very small.

102. In fact one of my former supervisors, Stan Witkowski, told me that Smith Barney feels that it can get away with treating older employees any way it wanted to because, under the law of averages, few would ever be able to pursue their claims against the Company.

103. Smith Barney is particularly biased against the older employees of Shearson such as myself because, a year after Smith Barney's acquisition of Shearson, it considered the older former Shearson people to be expendable as "dinosaurs."

104. Five of us former Shearson people, all over age 45, were told that we were being terminated on the same day, and their functions filled with much younger and less experienced persons.

105. The fact that the arbitration procedure has caused great injury to the rights of persons with age discrimination and civil rights claims has been a subject of widespread comment by experts familiar with both the litigation of such claims, as stated in the Comments of Judith P. Vladeck, Esq., "New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry," 63 Ford.L.Rev. 1625-1630 (1995) (Exhibit P annexed hereto), and also the statements of Janice Goodman, Esq., entitled "Mandatory Arbitration is Not an Alternative for Employees," presented at the Annual Meeting of the New York State Bar Association, Labor and Employment Law Section, January 26, 1996 (Exhibit Q annexed hereto), statements of which the Court is asked to take judicial notice.

106. Thus the arbitration procedure that has permitted

such a perversion of the purposes of the Age Discrimination in Employment Act to flourish at Smith Barney would cause me irreparable injury and facilitate the destruction of my career. Retaliatory blackball practice exists in the securities industry concerning the future employment of top officers at the Senior Vice President level such as myself who are known to have been terminated by a major firm, information that has already been published to the industry with an intent to injure by Smith Barney in the Form U-5 that has been filed with respect to me (Exhibit R annexed hereto), and assert age discrimination claims.

I. DEFENDANTS' MOTION WOULD VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

107. The granting of defendants' motion would cause compulsory arbitration of my age discrimination claims in violation of my constitutional rights.

108. Mandatory arbitration of employment claims in the securities industry serves no public function and provides no public benefit. Rather, mandating arbitration of employment discrimination claims is intended primarily to limit the liability of securities industry employers by allowing them to choose an employer-friendly forum where their success is more likely and where awards tend to be smaller than in civil courts.

109. Mandatory arbitration of employment discrimination claims deprives plaintiffs in the securities industry of their procedural and substantive due process rights that otherwise would be protected in the civil courts, including the following:

(a) Securities industry discrimination plaintiffs are deprived of their rights to a jury trial under the Seventh Amendment and their rights to a jury trial under the Age Discrimination in Employment Act.

(b) Securities industry discrimination plaintiffs are deprived of their rights to have Article III Courts, comprised of appointed judges with lifetime tenure and salary protection, adjudicate their claims of discrimination.

(c) Although securities industry arbitration rules on their face permit arbitrators to issue written findings of fact and conclusions of law, upon information and belief, the industry arbitration practice actively discourages arbitrators from issuing such written findings and conclusions in order to render any meaningful judicial review of those decisions difficult or impossible, thus denying plaintiffs any meaningful right to appeal arbitration decisions.

(d) Upon information and belief, the securities industry arbitration procedures do not provide for the selection of truly neutral arbitrators. Rather, arbitrators are selected by units that are governed and controlled by the representatives of the employers in the securities industry including defendant Smith Barney.

(e) Historically, the demographic characteristics of the arbitration panels do not represent the community of arbitrators qualified to decide employment disputes, but are overwhelmingly comprised of persons having positions or beneficial relationships in the securities industry, or further appointments of and compensation as arbitrators. These panels, on the whole, likely will be more hostile to discrimination claims brought by terminated employees than demographically representative panels. Further, the securities industry agencies use internal referral procedures to select arbitrators, keep secret the identities of the pools of the arbitrators who may hear disputes, and employ secret and subjective criteria in determining whom to recruit for those pools, all of which serve to perpetuate the imbalance of arbitration panels. These selection devices also serve to deprive plaintiffs of their equal protection rights to be free from discrimination in the selection of the finders of fact.

(f) Securities industry discrimination plaintiffs are deprived of their rights to have a panel with knowledge of age discrimination laws hear their claims, and do not provide adequate training in the area of employment discrimination to their arbitrators.

(g) Securities industry arbitrators are believed to be instructed in training manuals that they are not required to follow "case precedent or statutory law," which includes the complex legal framework of age discrimination laws including concepts such as disparate impact and disparate treatment, mixed motive factors, hostile working environment, shifting burdens of proof, after-acquired evidence, and fee-shifting provisions, to name only a few. Moreover, arbitrators' decisions are not judicially reviewable for statutory error.

(h) Historically, securities industry arbitration panels have been reluctant to find employers guilty of employment discrimination. Even where arbitration panels find unlawful conduct, they often award inadequate damages to the plaintiffs. Furthermore, upon information and belief, the securities industry arbitrators are believed regularly to engage in ex parte communications with others about the nature, subject and amounts of their decisions.

(i) Upon information and belief, the securities industry often imposes onerous and exorbitant "forum fees" on securities industry discrimination plaintiffs, even those who prevail, for pursuing their claims and often fail to award attorneys' fees as provided for under the Age Discrimination in Employment Act.

110. The Fifth Amendment to the United States Constitution, applicable to actions of the federal government, guarantees due process of law to the plaintiffs and all others similarly situated.

111. The system of mandating arbitration of employment discrimination claims constitutes action of the federal government because of: (1) the plenary regulation of the exchanges by the Federal Securities Acts; (2) the extensive delegation of regulatory power by the SEC to the exchanges as self-regulatory organizations; (3) the encouragement given by the SEC to the exchanges to require employees in the securities industry to arbitrate their employment disputes with their employers; (4) the permission granted by the SEC to the exchanges to modify their rules and regulations to require arbitration of all employment disputes; (5) the approval given by the SEC to the specific arbitration procedure utilized by the

exchanges; (6) the exercise of the judicial power by arbitrators in hearing and deciding statutory and common law disputes in the securities industry, which power has traditionally been an exclusive function of federal and state courts, (7) the action of the courts in enforcing coercive contracts of adhesion by compelling arbitration of employment disputes in the securities industry against the will of securities industry employees; and (8) the action of the courts in confirming arbitration awards in employment disputes where the dispute was arbitrated against the will of securities industry employees.

112. The compelling mandatory arbitration in the present case is unconstitutional because it would deprive me and all others similarly situated of our rights to a jury trial under the Seventh Amendment and under the Age Discrimination in Employment Act.

113. Requiring employees to waive their constitutional and statutory rights to a jury trial as a condition of employment imposes an unconstitutional condition on employment, in violation of the due process guarantees of the Fifth Amendment to the United States Constitution, and violates the Age Discrimination in Employment Act.

114. Compelling mandatory arbitration in the present action would be unconstitutional because it would deprive me and all other similarly situation of our right to adjudicate our claims before an Article III court under the Constitution and the Age Discrimination in Employment Act.

115. Requiring employees to agree to waive their constitutional rights to have their claims adjudicated by an Article III court as a condition of employment imposes an unconstitutional condition on employment, in violation of the due process guarantees of the Fifth Amendment, and violates the Age Discrimination in Employment Act.

116. Compelling mandatory arbitration in the present action would be unconstitutional because the procedures employed under the rules of the securities industry agencies, as described above, would deprive me and all others similarly situation of our rights to due process under the Fifth Amendment, including but not limited to our right to have the civil rights and employment laws enforced as written.

117. Requiring employees to waive their constitutional rights to due process, including but not limited to their rights to have the civil rights and employment laws enforced as written, as a condition of employment imposes an unconstitutional condition on employment, in violation of due process guarantees of the Fifth Amendment.

118. Compelling mandatory arbitration in the present case would be unlawful because the arbitration procedures employed by the securities industry agencies operate as a de facto forfeiture of statutorily-mandated rights or benefits afforded by the Age Discrimination in Employment Act and other employment laws, including, but not limited to, the right to a jury trial, and the right to attorneys' fees, in violation of the due process guarantees of the Fifth Amendment.

119. Requiring employees to agree to forfeit their important statutorily-mandated rights or benefits afforded by the Age Discrimination in Employment Act and other employment laws, including but not limited to the right to a jury trial, punitive damages, and attorneys' fees, as a condition of employment imposes an unconstitutional condition on employment, in violation of the due process guarantees of the Fifth Amendment.

WHEREFORE, the issues raised in the foregoing affidavit should be set down for hearing and determination before a jury pursuant to the requirements of the Federal Arbitration Act, 9 U.S.C. § 4, and the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f). Additional discovery needed for the purpose of that hearing should be granted as requested above.

Respectfully submitted,

/s/ Anthony De Meo
Anthony De Meo

Sworn before me this

10th day of June 1996:

/s/ Heather R. Boshak
Notary Public

RE-1. APPLICATION FOR APPROVAL OF EMPLOYMENT NEW YORK STOCK EXCHANGE, INC.

DEPARTMENT OF MEMBER FIRMS 26610

This page to be filled in by applicant employer organization
PLEASE TYPEWRITE INFORMATION

If application is incomplete it may be returned.

1.	DeMeo	Anthony	John
	Last name	First name	Middle

2. 9/11/70
Starting date

3. CWBL-Hayden, Stone, Inc.
To be employed by

4. 17 Battery Place North
Location of Office

5. (a) Administrative Manager
Title or position
(b) Administrative
Nature of primary duties

6. Type of approval Requested
   (a) Registered Representative-Rule 345(a)
   Full Registration X Limited Registration
   (b) Supervisory Person-Rule 342(d) X
   (c) Supervisory Analyst-Rule 344
   (d) Corporate Officer (Not an Allied Member or Approved Person)
   (Check a, b, or c also if applicable)

7. Compensation
   (a) Salary $________per__________
   (b) Commission on listed_%, unlisted_%, mutual funds

(c) Other. If candidate is to participate in profits of the employer organization or any office, department of affiliate or subsidiary corporation, give details here__________________

____

Complete and accurate answers to the questions listed on this application form will eliminate delay and assist the Exchange in acting expeditiously.

All time must be accounted for in question 14(a) including all self-employment, and showing all residence addresses during periods of unemployment. To expedite consideration of this application, if possible attach a letter from each employer listed confirming the capacity in which candidate was employed, the dates of employment, and conditions under which he left. If self-employed, indicate name or trade style, and all addresses at which candidate conducted business. Supply names and addresses of references for any period of self-employment, also unemployment of 6 months and over. If previous employer is out of business please indicate, and supply names and addresses of references to be contacted for verification.

Important: If candidate has served with the U.S. armed forces within the last 10 years, give dates, branch of service, rank or rate, identification number(if any) and type of discharge. A copy of the Discharge Papers(DD214) may also be attached.

Insert Carbon When Completing Next Page

17 Battery Place North New York, NY 10004 (212) 623-8000	New York, American and other Principal Exchange

ANTHONY DE MEO EMPLOYMENT

5/64 - 7/64	Methodist Hospital (Patient)
7/64 - 2/65	Manufacturers Hanover Trust 67 Broad Street, New York, NY
2/65 - 2/24/65	Methodist Hospital
3/65 - 7/65	Unemployed

THE TEN YEAR LIMIT DOES NOT APPLY TO THE FOLLOWING ITEMS THROUGH).29

16. (a) Have you ever been registered as a representative of a member of the N.A.S.D.? Yes 0 No X

(b) Are you presently employed by a member of the N.A.S.D. other than the present sponsor? Yes 0 No X

If "yes", give name, address and position held_______________________

(c) Have you taken the N.A.S.D. examination for registration? Yes 0 No X

If "yes", on what date?____ Grade? ___

17. (a) Are you at present engaged in any other business, either as a proprietor, partner, officer, director, trustee, employee or otherwise? Yes X No 0

If "yes", give details, including name and address. your title or capacity, nature of business, duties, compensation received, time spent, etc.________________

Bob Chevy Orchestras 1806 Flatbush Avenue
Brooklyn, NY Musician Weekends #92 4 hours

(b) Do you currently hold an insurance license? Yes 0 No X

If "yes", give state(s) where licensed--

(c) Do you currently hold a real estate license? Yes 0 No X

If "yes", give state(s) where licensed--

18. I am presently employed by:
CBWL-H

19. I have been bonded by (specify bonding company, amount, and whether currently in effect)________

Continental Insurance Co. - Current

20. (a) Have you ever been refused a bond by

a surety company? Yes 0 No X

(b) Has any surety company paid out any funds on your coverage? Yes 0 No X

If answer to either (a) or (b) is"yes", attach details.

21. (a) Have you ever been a member of any stock exchange, commodity exchange, or registered association of security or commodity brokers, dealers, investment bankers or investment advisors? Yes 0 No X

If "yes", give name(s) and dates.______

(b) Are you at present a member of any such exchange or registered association? Yes 0 No X

If "yes", give name(s)_____________

22. (a) Have you ever been suspended, expelled, fined, censured or otherwise disciplined by any regulatory body or by any exchange or association: or ever been refused membership therein; or ever withdrawn your application for such membership? Yes 0 No X

(b) Have you ever been associated with any organization, as director, controlling stockholder, partner, officer, or other representative of a broker-dealer which has been, or a principal of which has been, suspended or expelled from any exchange or registered association, or was refused membership therein, or withdrew an application for membership; or whose registration as a broker-dealer with the SEC or any State or agency has been denied, suspended or revoked? Yes 0 No X

(c) Are you now subject to an order of the N.A.S.D., any national securities exchange or S.E.C. which revokes, suspends or denies membership or registration? Yes 0 No X

(d) Have you ever been named as a "cause" in any action mentioned in the preceeding questions taken with respect to a broker-dealer? Yes 0 No X

(e) Have you ever been enjoined, temporarily or otherwise from selling or dealing in securities or commodities or from functioning as an investment advisor? Yes 0 No X

(f) Have you ever been a principal or employee of any corporation, firm, or association which was enjoined temporarily or otherwise from selling or dealing in securities or commodities or from functioning as an investment advisor? Yes 0 No X

23. If answer to questions 22 (a), (b), (c), (d), (e), or (f) is "yes", supply following information:
Nature of such action: Revocation_______
Expulsion____ Suspension__Injunction__
Other_________________________
Action taken by__Date of such action____
If suspended, give date of termination of suspension_____________________
Name of broker-dealer subject to such order________________________
Nature of your affiliation with such broker-dealer___________________

31. Further, and in consideration of the New York Stock Exchange, Inc.'s approving this application, I submit myself to the jurisdiction of such Exchange, and I agree as follows:

(a) That I will not guarantee to my employer or to any other creditor carrying s customer's account, the payment of the debit balance in such account, without the prior written consent of the Exchange.

(b) That I will not guarantee any customer against loss in his account or in any way represent to any customer that I or my employer will guarantee the customer against such losses.

(c) That I will not take or receive, directly or indirectly, a share in the profits of any customer's account or share in any losses sustained in any such account.

(d) That I will not make a cash or margin transaction or maintain a cash or margin account in securities or commodities, or have any direct or indirect financial interest in such a transaction or account, except with a member organization or with a bank. I understand and agree that no such transaction may be effected and no such account may be maintained without the prior consent of my employer, and that except for Monthly Investment Plan transaction such employer must receive promptly, directly from the carrying member or organization or bank, duplicate copies of all confirmations and statements relating to such transactions or account. I further understand and agree that I shall receive no compensation for commission or profits earned on nay transaction or account in which I have a direct or indirect financial interest, except with the approval of my employer and in accordance with the rules of the Exchange.

(e) That I will not rebate, directly or indirectly to any person, firm, or corporation any part of the compensation I receive as a registered employee and I will not pay such compensation or any part thereof, directly or indirectly, to any person, firm, or corporation, as a bonus, commission, fee or other consideration, for business sought or procured for me or for any member or member organization of the Exchange.

(f) That at any time, upon the request of the Department of Member Firms, or of any Committee or other Department of the New York Stock Exchange, Inc., I will appear before such Committee or Department and give evidence upon any subject under investigation by such Committee or Department, and that I will produce, upon request of the Exchange, all of my records or documents relative to any inquiry being made by the Exchange.

(g) I understand that any changes in compensation in any form, or additional compensation in any form, may be subject to disapproval by the New York Stock Exchange, Inc., and that I may not be compensated for business done by or through my employer after the termination of my employment, except as may be permitted by the Exchange.

(h) I agree that I will not take, accept or receive, directly or indirectly, from any person, firm, corporation, or association, other than my employer compensation of any nature, as a bonus commission, fee gratuity or other consideration, in connection with any securities or commodities transaction or transaction, except with the prior written consent of the Exchange.

(i) I will notify the Department of Member Firms promptly if, during the tenure of my employment, I become involved in any litigation or if any judgments are found against me; or if my registration or license to sell or deal in securities or to function as an investment advisor is ever refused, suspended or revoked; or if I become enjoined, temporarily or otherwise, from selling or dealing in securities or from functioning as an investment advisor; or if I am arrested, summoned, arraigned or indicted for a criminal offense; or if I become involved in bankruptcy proceedings.

(j) I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and rules then obtaining of the New York Stock Exchange, Inc.

(k) If the New York Stock Exchange, Inc., during the period of 30 days immediately following termination of my employment, gives me written notice that the Exchange is making inquiry into any specified matter or matters occurring prior to termination of such employment, I agree that I will thereafter comply with any request of the Exchange for me to appear and testify, submit records, respond to written requests, attend hearings, and accept disciplinary charges or penalties with respect to the matter or matters specified in such notice in every respect in conformance with the Constitution and Rules and practices of the Exchange in the same manner and to the same extent as required to do if I had remained an employee. If I refuse to accept such written notice or, having been given such notice, refuse or fail to comply with any such request of the Exchange, I agree that such refusal or failure may, in the discretion of the Exchange, act as a bar to future Exchange approval of my employment until such time as the Exchange has completed investigation into the matter or matters specified in such notice; has determined a penalty, if any, to be imposed against me; and until the penalty, if any, has been carried out.

Anthony J. DeMeo
297 Ramapo Valley Road
Mahwah, NJ 07430
(H) 201-529-4412
(W) 201-524-4899

Executive Summary: Seasoned professional with over 25 years of diversified experience and exceptional performance in the securities industry, including employee management, project management, finance, business planning, marketing, and strategy. Current consulting engagement to develop advanced broker workstation for global high net worth business and back office systems to support fee-based asset management business.

EXPERIENCE

Smith Barney Shearson, Inc. New York, NY

Senior Vice President

- Marketing Director, High Net Worth Services 1/94 - 9/94
- Chief Information Officer, Private Client Group 7/93- 1/94

Shearson Lehman Brothers Inc. New York, NY

- Chief Information Officer, Private Client Group6/92 - 7/93
- Associate Director of National Sales 6/90 - 6/92

Shearson Lehman Hutton, Inc. New York,NY

- Chief Administrative Officer, Financial Services Division 3/89 - 6/90
- Marketing Director for Shearson's "central asset account" [FMA] 5/88-3/89

Shearson Lehman Brothers Inc. New York, NY

- Marketing Director for Shearson's "central asset account" [FMA] 1/87 - 5/88
- Director of branch Operations 5/85- 1/87

Shearson Lehman American Express New York,NY

- Director of Branch Operations 4/84 - 5/85

Shearson American Express Inc. New York NY

First Vice President

* Director of General Services 6/81 - 4/84

Shearson Loeb Rhoades Inc. New York NY

* Director of General Services 12/79-6/81

Shearson Hayden Stone Inc. White Plains NY

* Director of General Services 1/76-12/79
* Regional Operations Manager 4/74-1/76

Hayden Stone Inc. White Plains NY

* Regional Operations Manager 1/73 - 4/74

Second Vice President

* Branch Administrative Manager White Plains Branch 1/71 -1/73

CBWL-Hayden Stone Inc. New York NY

* Branch Administrative Manager White Plains Branch
* Manager Mutual Funds Operations, Re-Organization Dept. 9/70-1/71

Hayden Stone Inc. New York, NY

* Manager Mutual Funds Operations 2/68-9/70

SELECTED ACCOMPLISHMENTS

Developed a program awarding special services which enhanced the productivity and business quality of life for the top 5% of Smith Barney's sales force.

Conceived and developed a strategy and business/systems plan for state-of-the-art broker workstation platform

Improved Shearson's broker and client information systems by re-engineering and simplifying the access and use of "key" broker information screens.

Designed and managed the implementation and marketing of Shearson's monthly statement, which has become the benchmark for the securities industry.

Developed and designed the Broker Information System for Shearson's tax lot accounting system [GLAS], the largest tax lot accounting system on Will Street.

Conceived and oversaw the development and implementation of the "Preferred Client Program [PCA], enabling the firm to more profitably and efficiently penetrate and serve high asset clients.

Designed and implemented a highly advanced system that enabled the broker to: view all the accounts in a household, consolidate statements for mailing purposes, track total assets and commissions, maintain telephone numbers and a note feature to keep track of conversations and trigger important follow up dates.

Coordinated all system initiatives for the Private Client Group, including Shearson's automated order entry system, an on line National telephone directory, an E-Mail system and a Dividend Reinvestment program for over 3,000 Listed securities.

Managed a fixed budget of over S85 million to run General Services, including: Graphics, Printing, Purchasing, Supplies, Proxy, Mail, Messengers, and Distribution. Oversaw the design of what is considered one of the largest and most sophisticated print and distribution facilities in New York.

Created "Laser Grams," a direct mail program which enabled the firm the ability to target selected clients with personalized messages from the broker.

EDUCATION

- * Ramapo College - Mahwah, New Jersey
- * Xerox Corp.'s Executive Development Program
- * New York Institute of Finance courses: Securities Clearance, Branch Operations, Legal Transfer, Margin
- * The Drucker Management Development Program
- * Securities Industry Association - Wharton School

NEW YORK STOCK EXCHANGE, INC.
Department of Member Firms
4 NEW YORK PLAZA
AT BROAD AND WATER STREETS
NEW YORK, N.Y. 10004
Division of
Member Offices and Personnel

Mr. Lester DeMott
Hayden Stone Inc.
17 Battery Place North
New York, N.Y. 10004

October 23, 1972

We currently have an RE-1 application for approval of employment submitted by your firm on behalf of Mr. Anthony John DeMeo on July 7, 1972.

Since his application has been held active beyond the normal training period and an examination request has not been received, nor has any further action been taken by your firm we are closing our files on him.

Should you make a request at some later date we would be happy to reopen the file and continue processing the application.

If you have any comments please feel free to write or call me.

Very truly yours,

/s/

James R. Davis
Manager

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--------------------------------x
ANTHONY DE MEO 95 Civ. 5791 (KMW)

Plaintiff

-against-

SMITH BARNEY INC.,
THE TRAVELERS INC.,
and TONI ELLIOTT.

Defendants
--------------------------------x

PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS WITH RESPECT TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

PLEASE TAKE NOTICE that, pursuant to Rule 34 of the Federal Rules of Civil Procedure, defendants are hereby requested to produce and permit plaintiff to inspect and copy each of the documents specified below at the offices of WISEHART & KOCH, 19 West 44th Street, Suite 412, New York, New York 10036, on or before March 8, 1996.

DOCUMENTS REQUESTED

Identify the location of the documents that refer to the following subjects and produce the documents that refer or relate thereto:

1. Any and all documents in defendants' possession or under their direction, supervision or control that are referred to in, or that are the source of the entries made on the Central Registration Depository Record annexed hereto, as produced by the National Association of Securities Dealers, that have reference to Anthony DeMeo.

2. Any and all documents in possession of or under the direction, supervision or control of the defendants that refer to the NASD Central Registration Depository, its uses and purposes.

DEFINITIONS AND INSTRUCTIONS

As used herein, the term "document" is synonymous in meaning and equal in scope to the usage of the term in Rule 34 of the Federal Rules of Civil Procedure. A draft or non-identical copy is a separate document within the meaning of this term, which also includes without limitation tapes, tape recordings, wires, film, sound recordings and/or transcripts thereof and information stored in the memory bank of a computer; reports and/or summaries of investigations; and opinions and reports of consultations; other reports; correspondence with opinions of counsel; other records; brochures; pamphlets; notices; newspaper items; circulars; trade letters; drafts of any documents; original or preliminary notes; marginal comments appearing on any document; any other information contained in any papers, writing or physical thing.

If any document is claimed to be privileged, identify the same, stating, in addition to the information otherwise required for such information in S.D.N.Y. Civil Rule 46(e), (i) the identification of any persons who either sent or received the original or any copy thereof, and (ii) the precise basis on which such privilege is claimed as to each part of the document with respect to which the privilege is claimed, with identification of the contents thereof in sufficient detail to permit an evaluation of said claim of privilege.

(1) All documents requested include all attachments and enclosures. Any document(s) in part responsive to a Request shall be produced in their entirety.

(2) Each Request requires that documents either be produced in the same form or in the same order in which they existed prior to production (e.g., in the manner in which they are kept in the usual course of business; in the boxes, file folders, bindings or other containers in which the documents are found; and/or with the title, labels or other descriptions left intact); or that documents be produced in an organized fashion and labeled to correspond with each individual Request to which they are responsive.

(3) If a document is produced in redacted form, state with particularity the reason(s) it is not produced in full, and describe generally those portions of the document which are not being produced sufficient to describe and identify the redacted portions for purposes of a motion to compel their production.

(4) If production of any requested document is objected to on the grounds that it is burdensome or oppressive, identify:

(a) the precise reasons why production poses a special burden;

(b) the approximate number of document(s) which have been called for; and

(c) the location(s) of the document(s) which have been called for.

(5) With respect to each document that has been lost, destroyed or otherwise disposed of since its preparation or receipt, identify the document and give the full particulars or circumstances whereby the document was lost, destroyed or otherwise disposed of.

(6) In all cases where originals and/or non-identical copies are not available, "documents" also means identical

copies of original documents and copies of non-identical copies.

(7) Production of documents in connection therewith, should be interpreted to include electronic mail, voice mail, and all related computer information.

(8) Included would be the production of any and all relevant computer files, active and/or archival, whole or partial, in physical, electronic or any tangible or translatable form, and records, backups, indices, lists, abstracts, and/or summaries thereof, including data, calculations, electronic communications and/or exchanges, mail and/or voice mail and/or bulletin board services, whole or partial, whether extant or deleted, unstored, erased, or overwritten, translatable in reasonably usable form, as well as abstracts or directories, histories, indices or any record of any such information, its production, storage, interpretation, use or destruction.

(9) This would apply to all computer systems under the control of the company or its employees, agents, consultants and/or communications carriers, including, without limitation, mainframe computers and/or MacIntosh or other desktop computer systems, mini-computers, tower data bases, portable computers, notebook computers, lap-top computers, and/or all other types of data communication, processing and/or storage systems.

(10) This would also apply to voice mail or other messages sent through AT&T and/or other carriers and their computer systems, and the billing information relating thereto.

(11) All affected persons, employees, agents, consultants and/or communications carriers be immediately notified to preserve any and all computerized information that may be responsive to this request or relevant to the issues raised by this litigation.

(12) Defendants are expected to use applicable definitions to the undefined words in accordance with custom and usage of the English language.

(19) Unless otherwise indicated, the time period of this Request is from July 1964 to the date of your response.

(20) The document requests shall be deemed continuing so as to require further and supplemental production if you receive or generate additional documents between the time of original production and the time of trial.

Dated: New York, New York
March 6, 1996

/s/
Arthur M. Wisehart (AMW 4003)

WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

Attorneys for Plaintiff
Anthony DeMeo

TO: Michael Delikat
Joseph M. Cohen
ORRICK, HERRINGTON & SUTCLIFFE
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

F I L E D
SEP 5 1997
CLERK

No. 97-59 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY DE MEO,

Petitioner,

v.

SMITH BARNEY, INC., TRAVELERS GROUP, INC. and
TONI ELLIOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI OR, IN THE
ALTERNATIVE, A WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MICHAEL DELIKAT
Counsel of Record
ROBERT S. WHITMAN
ORRICK, HERRINGTON &
SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

Attorneys for Respondents

27 pp

QUESTION PRESENTED

Whether the court of appeals properly dismissed, for lack of appellate jurisdiction, an appeal from an interlocutory order granting the defendants' motion to compel arbitration and stay litigation in an action seeking damages for alleged employment discrimination.

LIST OF PARTIES TO THIS PROCEEDING

The parties to this proceeding are Petitioner Anthony De Meo and Respondents Smith Barney, Inc., Travelers Group, Inc. (incorrectly named in the Petition as The Travelers, Inc.), and Toni Elliott. With respect to the two corporate parties, the parent of Smith Barney Inc. is Smith Barney Holdings Inc., which is a wholly-owned subsidiary of Travelers Group Inc.

All subsidiaries of Smith Barney Inc. are wholly owned.

The following are the direct or indirect subsidiaries of Travelers Group Inc. that are not wholly owned by Travelers Group Inc. (Two wholly owned subsidiaries of Travelers Group Inc. each own 50% of the voting securities of the entities marked with an asterisk.)

La Metropole S.A.
Copeland Associates Agency of Ohio, Inc.
Copeland Benefits Management Company
Travelers Group Investment Management, LLC*
Primerica Financial Services Ltd.
Travelers Property Casualty Corp.
    Travelers Casualty and Surety Company
    AE Development Group, Inc.
    Aetna Casualty & Surety Company of Canada
    Aetna Information Services Inc.
    Aetna National Accounts U.K. Limited
    Charter Oak Services Corporation
    Farmington Casualty Company
    Farmington Management Inc.
    Travelers Casualty and Surety Company of America
    Travelers Casualty and Surety Company of Illinois
    Travelers Casualty Company of Connecticut
    Travelers Commercial Insurance Company
    Travelers Excess and Surplus Lines Company
    Travelers Lloyds of Texas Insurance Company
    Urban Diversified Properties, Inc.

The Standard Fire Insurance Company
AE Properties, Inc.
Community Rehabilitation Investment Corporation
The Automobile Insurance Company of Hartford, Connecticut
TravCal Secure Insurance Company
TravCal Indemnity Company
Travelers Personal Security Insurance Company
Travelers Property Casualty Insurance Company
Travelers Property Casualty Insurance Company of Illinois
The Travelers Indemnity Company
Commercial Insurance Resources, Inc.
Gulf Insurance Company
Atlantic Insurance Company
Gulf Risk Services, Inc.
Gulf Underwriters Insurance Company
Select Insurance Company
Countersignature Agency, Inc.
First Floridian Auto and Home Insurance Company
First Trenton Indemnity Company
Red Oak Insurance Company
Lararnia Insurance Agency, Inc.
Secure Affinity Agency, Inc.
The Charter Oak Fire Insurance Company
The Parker Realty and Insurance Agency, Inc.
The Phoenix Insurance Company
Constitution State Service Company
The Travelers Indemnity Company of America
The Travelers Indemnity Company of Connecticut
The Travelers Indemnity Company of Illinois
The Premier Insurance Company of Massachusetts
The Travelers Home and Marine Insurance Company
The Travelers Indemnity Company of Missouri
The Travelers Lloyds Insurance Company

    - The Travelers Marine Corporation
    - TI Home Mortgage Brokerage, Inc.
    - TravCo Insurance Company
    - Travelers Bond Investments, Inc.
    - Travelers General Agency of Hawaii, Inc.
    - Travelers Medical Management Services Inc.
    - Travelers Specialty Property Casualty Company, Inc.
- Commercial Credit Services do Brazil Ltda.
- Smith Barney Private Trust Company (Cayman) Limited[*]
- Greenwich (Cayman) I Limited[*]
- Greenwich (Cayman) II Limited[*]
- Greenwich (Cayman) III Limited[*]
- Smith Barney Credit Services (Cayman) Ltd.[*]
- Smith Barney Commercial Corporation Asia Limited
- Smith Barney Securities Investment Consulting Co. Ltd.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THIS PROCEEDING ii

TABLE OF AUTHORITIES vii

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 9

APPENDIX OF STATUTORY TEXT A-1

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953 (10th Cir. 1994) 6

Altman Nursing, Inc. v. Clay Capital Corp., 84 F.3d 769 (5th Cir. 1996) 6

Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990) 6

Ballay v. Legg Mason Wood Walker, Inc., 878 F.2d 729 (3d Cir. 1989) 4

Bird v. Shearson Lehman/American Express, Inc., 926 F.2d 116 (2d Cir.), *cert. denied*, 501 U.S. 1251 (1991) 8

Catlin v. United States, 324 U.S. 229 (1945) 4

Doctor's Assocs., Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996) 8

Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 129–30 (2d Cir.), *pet'n for cert. filed*, 66 U.S.L.W. 3108 (U.S. July 22, 1997) 8

Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58, 60-61 (2d Cir. 1993) 5

Gammaro v. Thorp Consumer Discount Co., 15 F.3d 93 (8th Cir. 1994) 6

Harrison v. Nissan Motor Corp., 111 F.3d 343 (3d Cir. 1997) 4

In re Chung, 943 F.2d 225 (2d Cir. 1991) 5

In Re Pisgah Contractors, Inc., 117 F.3d 133 (4th Cir. 1997) 5

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 3

North River Ins. Co. v. Philadelphia Reinsurance Corp., 63 F.3d 160 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1289 (1996) 6

Perera v. Siegel Trading Co., 951 F.2d 780 (7th Cir. 1992) 6

Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) 6

S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58 (2d Cir. 1993) 5

Statutes:

9 U.S.C. §§ 1–16 .... *passim*

28 U.S.C. §§ 1254(1) and 1651(a) 2

28 U.S.C. § 1291 3

28 U.S.C. § 1292(b) 4

29 U.S.C. § 626(f) 7

Other Authorities:

H.R. Rep. No. 100-889 at 37, *reprinted in* 1988 U.S.C.C.A.N. 5982, 5997 4

Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5120 4

Sup. Ct. R. 20.1 8

Sup. Ct. R. 20.2, 20.3 8

No. 97-59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY DE MEO,

Petitioner,

v.

SMITH BARNEY, INC., TRAVELERS GROUP, INC. and TONI ELLIOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS AND ORDERS BELOW

The orders of the court of appeals dismissing Petitioner's appeal (Pet. App. 5a–7a) and denying his petition for a writ of mandamus (Pet. App. 3a–4a) are unreported. The order of the district court compelling arbitration and staying the litigation (Pet. App. 20a–24a) is also unreported.

BASIS FOR JURISDICTION

The order of the court of appeals was issued on April 8, 1997. The petition for a writ of certiorari was filed on July 7,

1997. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 1651(a).

STATUTES INVOLVED

The verbatim text of the Federal Arbitration Act, 9 U.S.C. §§ 1–16, and 28 U.S.C. § 1291 are set out in the Appendix hereto.

STATEMENT OF THE CASE

In August 1995, Petitioner commenced an action against Respondents in the United States District Court for the Southern District of New York, alleging that his employment was terminated on the basis of his age. He sought compensatory and punitive damages and other relief pursuant to federal, state and local age discrimination laws. Pet. App. 42a–51a.

Respondents answered the complaint, denying the material allegations therein and raising as an affirmative defense that Petitioner's claims were subject to compulsory arbitration pursuant to a written arbitration agreement. On November 2, 1995, after Petitioner rejected Respondents' demand for arbitration, Respondents filed a Motion to Compel Arbitration and Stay Litigation pursuant to sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 3–4 (the "FAA"). Respondents contended that Petitioner was a party to a valid and enforceable arbitration agreement with the New York Stock Exchange, Inc. ("NYSE"), which required that he submit to arbitration any claims arising out of his employment or the termination of his employment with Smith Barney.

After allowing Petitioner to conduct discovery directed solely to the pending motion, the district court ordered Petitioner to submit papers in opposition to the motion. Petitioner did not do so. Instead, he filed a cross-motion, pursuant to section 4 of the FAA, requesting a jury trial to determine whether his age discrimination claims were covered by a valid written arbitration agreement. He also sought further discovery for purposes of the jury trial.

On December 2, 1996, the district court granted Respondents' motion to compel arbitration and denied Petitioner's cross-motion, finding sufficient evidence in the record to determine that Petitioner was a party to a valid agreement to arbitrate his age discrimination claims. The court directed the parties to arbitrate but retained jurisdiction over the case, ordering the parties to inform it of the status of the arbitration by May 20, 1997. Pet. App. 20a–24a.

Despite the interlocutory nature of the district court's order, Petitioner filed a Notice of Appeal on December 12, 1996. Respondents moved to dismiss the appeal, arguing that the court of appeals lacked jurisdiction under 28 U.S.C. § 1291 and the FAA because the district court's order was not "final" and was therefore not appealable. Petitioner filed a cross-motion seeking a writ of mandamus.

After hearing oral argument, the court on April 8, 1997 granted the motion to dismiss and denied the cross-motion for a writ of mandamus. Pet. App. 3a–7a. Petitioner filed the instant petition on July 7, 1997.

ARGUMENT

The FAA embodies a strong federal policy in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). In furtherance of that policy, the statute prohibits appeals of interlocutory orders, such as the order issued by the district court in this case, granting a defendant's motion to compel arbitration and stay litigation. The courts of appeals have been unanimous in reaching that same conclusion. Ignoring the jurisdictional issue that was the basis for the appeals court's dismissal, Petitioner instead raises a variety of arguments opposing the district court's arbitration order on the merits. He makes no attempt to demonstrate that the issues presented by the dismissal of his appeal warrant this Court's review on certiorari; he does not even suggest that the court dismissed his appeal in error. Accordingly, the Petition should be denied.

The federal courts of appeals have jurisdiction to review "final decisions of the district courts of the United States." 28 U.S.C. § 1291. An order is considered "final" for purposes of appellate jurisdiction if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Section 16 of the FAA reiterates these principles in the specific context of arbitration. It expressly prohibits immediate review of an interlocutory order compelling arbitration unless the order is certified for appeal under 28 U.S.C. § 1292(b), and permits immediate review only in specific circumstances not applicable here. 9 U.S.C. § 16. In enacting that provision, Congress intended, consistent with the strong federal policy favoring arbitration, to "make clear that any order favoring litigation over arbitration is immediately appealable and any order favoring arbitration over litigation is not." *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 348 (3d Cir. 1997) (quoting *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729, 732 (3d Cir. 1989)) (alteration in original).[1]

The courts interpreting section 16 have uniformly held that a decision compelling arbitration may be appealed only in "independent" proceedings -- those where the *plaintiff* brings an action to compel arbitration, such that the only issue for decision is whether arbitration should be compelled and the court's resolution of that question is a "final decision" for purposes of section 1291. In contrast, the instant litigation is an "embedded" proceeding -- where the *defendant* brings a motion to compel arbitration in response to the plaintiff's initiation of proceedings in court. In "embedded" proceedings, the court's interlocutory decision to compel arbitration is not "final" because the parties retain the ability to litigate issues of arbitrability at a later time. The court of appeals explained the difference between "embedded" and "independent" proceedings as follows:

---

[1] The provision of the FAA regarding appeals was added to the statute in 1988. The House Report accompanying that provision states that, under the new statute, "interlocutory appeals are provided for when a trial court rejects a contention that a dispute is arbitrable under an agreement of the parties and instead requires the parties to litigate. In contrast, interlocutory appeals are specifically prohibited in new section 15 when the trial court finds that the parties have agreed to arbitrate and that the dispute comes within the arbitration agreement." H.R. Rep. No. 100-889 at 37, *reprinted in* 1988 U.S.C.C.A.N. 5982, 5997. (This provision was denominated as section 15 when it was enacted, but later became section 16 after a 1990 amendment. See Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5120.)

> If the suit is "independent," *i.e.*, the plaintiff seeks an order compelling or prohibiting arbitration or a declaration that a dispute is arbitrable or not arbitrable, and no party seeks any other relief, a final judgment ending such litigation is appealable at once. If arbitration has been ordered, the objecting party need not await the outcome of the arbitration before challenging the order to arbitrate.
>
> If the suit is "embedded," i.e., a party has sought some relief other than an order requiring or prohibiting arbitration (typically some relief concerning the merits of the allegedly arbitrable dispute), orders denying arbitration are immediately appealable, *but orders directing arbitration are not immediately appealable. In the latter circumstance, the party opposing arbitration cannot challenge the arbitration requirement until the arbitration has occurred and its result is available for challenge on a motion to confirm or vacate the award.* In effect, the pro-arbitration tilt of the [FAA] requires that, with respect to embedded actions, the party opposing arbitration must bear the initial consequence of an erroneous district court decision requiring arbitration.

Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58, 60–61 (2d Cir. 1993) (emphasis added) (citations omitted). "Since a court retains jurisdiction over the parties to an embedded proceeding while they arbitrate a discrete portion of their dispute, it is logical to delay an appeal of a ruling compelling arbitration until the court subsequently confirms or rejects the arbitrator's decision." *In re Chung*, 943 F.2d 225, 228 (2d Cir. 1991) (internal citations omitted).

All other courts of appeals to address this issue have applied the same analysis. *See, e.g.*, *In Re Pisgah Contractors, Inc.*, 117 F.3d 133 (4th Cir. 1997) ("Even where a district court's order compelling arbitration compels the arbitration of all substantive claims involved in the dispute, that order is not 'final' for purposes of appealability, unless the only issue before the district court was whether an order directing arbitration should be issued or not."); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 770–71 (5th Cir. 1996) ("An order involving an embedded proceeding is always an interlocutory order; an order involving an independent claim is always final."); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) ("an order does not constitute a final decision, and is not immediately reviewable on appeal, if . . . relief other than a determination as to the arbitrability of the dispute is sought"); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994) (where plaintiff brought a putative class action alleging violations of federal and state law, and defendant responded by moving to compel arbitration, the case "is a typical example of an embedded proceeding" where an interlocutory appeal is precluded); *Perera v. Siegel Trading Co.*, 951 F.2d 780, 785 (7th Cir. 1992) (orders compelling arbitration are "final if arbitration is the sole issue before the court and interlocutory if raised in an embedded proceeding").

In contrast, courts have allowed appeals from arbitrability determinations only when such determinations end the litigation in its entirety. *See, e.g.*, *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 163–64 (2d Cir. 1995) (proceeding was "independent" where plaintiff initiated the litigation solely to compel arbitration and no party sought other relief), *cert. denied*, 116 S. Ct. 1289 (1996); *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1301–02 (9th Cir. 1994) (proceeding was "independent" because initial claim for relief was brought in state court and defendant brought separate federal court action to compel arbitration), *cert. denied*, 116 S. Ct. 61 (1995); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (order compelling arbitration was appealable because district court did not stay the litigation and retain jurisdiction but dismissed the complaint in its entirety).

The distinction between "embedded" and "independent" proceedings is determinative in this case. Petitioner commenced the litigation by filing a complaint seeking relief for alleged violations of the age discrimination laws. After raising Petitioner's arbitration agreement as an affirmative defense, Respondents then moved for an order compelling arbitration and staying litigation under sections 3 and 4 of the FAA. Under these circumstances, the district court's order granting Respondents' motion was not subject to immediate appellate review. The court of appeals correctly determined that it lacked jurisdiction over Petitioner's appeal under section 1291 and the FAA because an order staying litigation pending arbitration is not an appealable final order.

Petitioner presents no argument on the threshold issue of appellate jurisdiction. Instead, as he did below, Petitioner makes arguments only as to the enforceability of the arbitration agreement itself. Those arguments have nothing to do with the issue currently presented by this case: whether an interlocutory order compelling arbitration in an embedded proceeding is immediately appealable.[2] The law is unequivocal that in circumstances such as these, where the district court has rejected such arguments, directed the parties to arbitrate, and stayed the litigation, the plaintiff may raise the arguments anew only in post-arbitration proceedings to confirm or vacate the award.

Petitioner also has no right to immediate appellate review of that part of the Order which denied his cross-motion, pursuant to section 4 of the FAA, for a jury trial to determine whether a valid arbitration agreement existed and for an order granting Petitioner additional time to conduct discovery. The determination of whether the parties have agreed to arbitrate must be made in connection with any motion to compel arbitration under the FAA. *See* 9 U.S.C. §§ 2–4; *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 118 (2d Cir.), *cert. denied*, 501 U.S. 1251 (1991). Since an order staying litigation pending arbitration is interlocutory and not immediately appealable under the FAA, any finding made by the district court in the course of reaching that result (*e.g.*, that a valid arbitration agreement exists) is not a "final" order entitled to immediate appellate review. *See* 9 U.S.C. § 16. Otherwise, as the court of appeals recognized, *see* Pet. App. 13a–17a, every party opposing a motion to compel arbitration and stay litigation would perfunctorily deny the existence of the arbitration agreement and request a jury trial in order to circumvent the FAA's bar on piecemeal appeals.[3]

---

[2] Petitioner argues that the courts of appeals are divided over the issue of when an agreement to arbitrate is sufficiently voluntary and that the Equal Employment Opportunity Commission opposes mandatory arbitration, *see* Pet. 5–7; that the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), precludes mandatory arbitration with respect to older workers, *see id.* 7–13; and that mandatory arbitration violates the Seventh Amendment, *see id.* 13–15. These issues relate to the enforceability of the arbitration agreement in the first place, not to the jurisdiction of the court of appeals over an interlocutory order compelling arbitration.

Finally, Petitioner's alternative request for a writ of mandamus is no different from the foregoing and should be denied. His Petition offers no argument in support of the request: he does not contend that the court of appeals even erred in dismissing his appeal, let alone suggest that, in doing so, the court so exceeded its authority as to justify the extraordinary remedy of mandamus. *See* Sup. Ct. R. 20.1. Nor did Petitioner follow the procedural requirements governing a request for such a writ in this Court. *See* Sup. Ct. R. 20.2, 20.3.

---

[3] There is no automatic entitlement to a jury trial on this issue under section 4 of the FAA. *See, e.g.*, *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 129–30 (2d Cir.), *pet'n for cert. filed*, 66 U.S.L.W. 3108 (U.S. July 22, 1997); *Doctor's Assocs., Inc. v. Jabush*, *89* F.3d 109, 113 (2d Cir. 1996). Petitioner had the burden of establishing a genuine triable issue of fact with respect to the existence of the arbitration agreement. *Distajo*, 107 F.3d at 129–30. Once the district court held that no such issue existed, section 16 of the FAA expressly precluded an immediate appeal and required Petitioner to await completion of the arbitration proceedings.

CONCLUSION

The petition for a writ of certiorari or in the alternative for a writ of mandamus should be denied.

Respectfully submitted,

MICHAEL DELIKAT
Counsel of Record
ROBERT S. WHITMAN
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
212-506-5000

Attorneys for Respondents

September 8, 1997

APPENDIX

APPENDIX OF STATUTORY TEXT

28 U.S.C. § 1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

9 U.S.C. § 1 "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2 Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3 Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4 Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof, hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5 Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 6 Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 7 Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8 Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justifiable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9 Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10 Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11 Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12 Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 13 Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 14 Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

9 U.S.C. § 15 Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. §16 Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

No. 97-59 (3)

FILED
SEP 17 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

◆

ANTHONY DE MEO,

Petitioner,

—v.—

SMITH BARNEY INC., TRAVELERS, INC. and TONI ELLIOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY

ARTHUR M. WISEHART
Counsel of Record

WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

Counsel for Petitioner

40 PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. MANDAMUS IS APPROPRIATE BECAUSE THE CIRCUMSTANCES IN THIS CASE ARE EXTRAORDINARY ... 1

II. MANDAMUS IS WARRANTED BECAUSE THE DISTRICT COURT DEPRIVED PETITIONER OF HIS RIGHT TO A JURY TRIAL 7

CONCLUSION 10

APPENDIX RA1

TABLE OF AUTHORITIES

Page(s)

Cases:

Dairy Queen, Inc. v. Wood,
369 U.S. 469 (1962) 7-8

De Beers Consol. Mines, Ltd. v. United States,
325 U.S. 212 (1945) 2

Far East Conference v. United States,
342 U.S. 570 (1952) 2

Filanto, S.P.A. v. Chilewich Int'l Corp.,
984 F.2d 58 (2d Cir. 1993) 3, 4

In re Hooker Investments, Inc.,
937 F.2d 833 (2d Cir. 1991) 8

United States Alkali Export Ass'n v.
United States,
325 U.S. 196 (1945) 2, 3

Constitutional Provision:

U.S. Const. amend. VII 9

Page(s)

Statutes:

Federal Arbitration Act,
9 U.S.C. § 4 . . . . 4, 9, 10

28 U.S.C. § 1254(1) 1

All Writs Act,
28 U.S.C. § 1651(a) 1

Age Discrimination in Employment Act,
29 U.S.C. §§ 621, et seq. 3, 4, 7

29 U.S.C. § 626(c)(1) 4

29 U.S.C. § 626(c)(2) 4

Older Workers Benefit Protection Act,
29 U.S.C. § 626(f) 3, 4, 7, 9

29 U.S.C. § 626(f)(1) 4

29 U.S.C. § 626(f)(3) 4, 9

Other Authorities:

16B Wright-Miller-Cooper, Federal Practice
and Procedure § 4005 (2d Ed. 1996) 2

Wall Street Journal, September 12, 1997 5

EEOC Policy Statement on Mandatory Arbitration,
BNA's Emp. Disc. Rep., vol. 9
(July 16, 1997) 3, 5, 6

ARGUMENT

I. MANDAMUS IS APPROPRIATE BECAUSE THE CIRCUMSTANCES IN THIS CASE ARE EXTRAORDINARY

Respondents' brief incorrectly states that petitioner "presents no argument on the threshold issue of appellate jurisdiction" (Res. Br. p. 7), completely ignoring the jurisdictional statement in the Petition and authorities cited therein under both 28 U.S.C. § 1254(1) "or, in the alternative, under the All Writs Act, 28 U.S.C. § 1651(a)." (Pet. p. 2.)

Moreover, respondents failed to cite a single case that deals with the availability of mandamus review despite the fact that the Petition filed herein, with permission explicitly given by the Clerk of the Court, plainly states that it is for review by certiorari "or, in the alternative, mandamus," and sets forth both the statutory and precedential basis for such jurisdiction on page 2. (Pet. p. 2.)

In addition, respondents have completely ignored the significance of extraordinary circumstances presented by this case. Respondents rely solely on the distinction between interlocutory and final judgments, or "independent" and "embedded" proceedings, to assert that the district court's order compelling arbitration is not reviewable by this Court. (Res. Br. pp. 3-5.)

If respondents' argument prevails, this issue will perpetually avoid effective review by this Court. However, it is established that mandamus relief is available under the All Writs Act, 28 U.S.C. § 1651(a), which states, in pertinent part, "The Supreme Court . . . may issue all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law."

As stated in 16B Wright-Miller-Cooper, Federal Practice and Procedure, § 4005, p. 109, note 43 (2d Ed. 1996):

> "Notwithstanding [the] deference to the final judgment rule, the Supreme Court itself has frequently resorted to extraordinary writ review specifically for the purpose of avoiding perceived hardships that would result from awaiting a final judgment."

See also Far East Conference v. United States, 342 U.S. 570 (1952); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945); United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945).

Similar circumstances to those raised here were presented in United States Alkali Export Ass'n v. United States, 325 U.S. 212 (1945), in which a district court denied a motion to dismiss a claim under federal anti-trust law on the grounds that the Federal Trade Commission ("FTC") retained exclusive jurisdiction over the claim. Id. at 204. This Court held that the district court's denial was reviewable by the Supreme Court despite the fact that the district court's denial was not a final order. The Court stated (United States Alkali, 325 U.S. at 205):

> "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of asserted Congressional policy of conferring primary jurisdiction on the [Federal Trade] Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment."

The Court based its decision, in part, on the conflict between the district court's jurisdiction and the jurisdiction and the rights claimed by the associations to have their case decided by the FTC. Id. at 203.

This Court should not require petitioner to await a final judgment by an arbitrator before appealing the district court's order. Petitioner, like the export associations in United States Alkali, will suffer great hardship if this Court does not issue a writ of mandamus because petitioner will be compelled to arbitrate. The EEOC Policy Statement (discussed below) dated July 10, 1997, issued three days after the Petition in this case was filed, makes clear the inherent inferiority of mandatory arbitration in such cases, and that individuals who are forced to arbitrate statutory rights claims are exposed to a great risk of having those rights abrogated.

Respondents ask this Court to require the petitioner to "bear the initial consequence of an erroneous district court decision requiring arbitration." (Res. Br. p. 5), (quoting Filanto, S.P.S. v. Chilewich Int'l Corp., 984 F.2d 58, 60-61 (2d Cir. 1993).) That consequence is an unreasonable burden for petitioner to bear. The jurisdictional and substantive issues are so intertwined that denying petitioner's Petition will strip him of his statutory rights under the ADEA, and thwart the intent of Congress to provide claimants such as petitioner a federal judicial forum in which to litigate their age discrimination claims.

The importance of the Supreme Court's review of the issues presented herein is a fortiori in this case because of the applicability of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA"), an amendment to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq., ("ADEA") as discussed in Point II of the Petition for Writ of Certiorari or, in the Alternative, Mandamus dated July 7, 1997, at pp. 7-13. The statutory OWBPA protections did not apply in Filanto, S.P.S. v. Chilewich Int'l Corp., 984 F.2d 58 (2d Cir. 1993), relied on by respondents. (Br. 5.)

The OWBPA provides protection against waivers of any "right or claim under this Act unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). Included in the rights under the OWBPA, as an amendment to the ADEA, is the right to a trial by jury (29 U.S.C. § 626(c)(1) & (2), a statutory right not protected under the District Court's order compelling arbitration. (20a-24a)[1]

Under the OWBPA, the burden of proving that any such waiver is knowing and voluntary rests on the employer, Smith Barney, 29 U.S.C. § 626(f)(3). Smith Barney would not be able to satisfy this burden because of the ambiguous language contained in the boilerplate form used by the securities industry in 1972 relied upon by respondents which, under the principles established in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63, 115 S.Ct. 1212 (1995), must be construed against the party that drafted it.

Disputed fact issues were presented to the district court regarding whether there was an "knowing and voluntary" waiver by petitioner of his rights to a jury trial of his age discrimination claims and the existence of an agreement to arbitrate the dispute. (Pet. 11) However, instead of holding a jury trial on the issue as provided under Section 4 of Federal Arbitration Act (9 U.S.C. § 4) as requested by petitioner (23a), the district court compelled arbitration and failed to address the conflict with the statutory provisions of the OWBPA.

---

[1] Citations followed by the suffix "a" refer to the Appendix of the Petition for Writ of Certiorari, or, in the alternative, Mandamus.

The recently announced position of the Equal Employment Opportunity Commission ("EEOC") further demonstrates the extraordinary importance of this case. The EEOC Policy Statement on Mandatory Arbitration[2] (BNA's Emp. Disc. Rep., vol. 9, p. 87) ("Policy Statement"), (RA4-RA24), issued three days after the Petition herein was filed, explains in great detail the basis on which the EEOC opposes mandatory arbitration of statutory rights. Moreover, Ellen Vargyas, Legal Counsel for the EEOC, has stated "that [the EEOC] intend[s] to litigate in [its opposition to mandatory arbitration of discrimination claims]." Wall Street Journal, Sept. 12, 1997, p. B19. (RA1-RA3.)

The EEOC Policy Statement denounces arbitration as an unsuitable forum in such cases. (BNA's Emp. Disc. Rep. at p. 90) (RA14-RA19.) An arbitrator is not publicly accountable, (citing United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960)), an arbitrator is not required to explain in writing the basis for an award, an arbitrator is not required to comply with the Federal Rules of Evidence or Civil Procedure, and judicial review of arbitration awards is extremely narrow. (BNA's Emp. Disc. Rep. at 90-91) (RA14-RA17.)

The most disturbing aspect raised by the EEOC's Policy Statement is the evidence presented that arbitration is biased in favor of employers-- particularly in a case like this one involving the securities industry. The EEOC cites a survey conducted in the securities industry which found that arbitration unduly favors employers, and subjects employers to modest damage awards. (BNA's Emp. Disc. Rep. at p. 91, fn. 14) (RA18.)

---

[2] The EEOC Policy Statement on Mandatory Arbitration appears in the Appendix at page RA4-24.

Furthermore, the recommendations of two federal commissions and the National Academy of Arbitrators exemplify the inadequacy of arbitration of statutory rights claims. The Commission on the Future of Worker-Management Relations ("Dunlop Commission") in its Report and Recommendations (1994) "strongly recommend[s] that binding arbitration agreements not be enforceable as a condition of employment[.]" (BNA's Emp. Disc. Rep. at p. 91 (quoting Dunlop Report at 32). (RA18.) The Dunlop Commission stated:

> "The public rights embodied in state and federal employment law -- such as freedom from discrimination in the workplace . . . -- are an important part of the social and economic protections of the nation." (alteration in original)

The United States Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation ("Brock Commission") echoed the position of the Dunlop Commission. The Brock Commission's report, "Working Together for Public Service" (1996), stated that "ADR should normally not be used in cases that represent tests of significant legal principles or class action." Brock Report at p. 82. (BNA's Emp. Disc. Rep at p. 90, fn. 13) (RA16-RA17.) This case involves significant legal issues related to petitioner's claim of widespread age discrimination in the securities industry.

Moreover, the National Academy of Arbitrators opposes mandatory employee arbitration "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997). Because arbitration contains institutionalized bias, and arbitrators generally award meager damages, arbitration encourages employers to believe that the violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), the Older Workers Benefit Protection Act, 29 U.S.C. §626(f), and other federal civil rights legislation, will not expose them to serious risk.

The unanimous position of the EEOC, the Dunlop Commission, the Brock Commission and the National Academy of Arbitrators is convincing evidence that supports this Court's mandamus review of the district court's order.

II. MANDAMUS IS WARRANTED BECAUSE THE DISTRICT COURT DEPRIVED PETITIONER OF HIS RIGHT TO A JURY TRIAL

Respondents' brief relegates to a footnote (Res. Br. fn. 3, p. 8) the important issue involving petitioner's constitutional right to a jury trial.

Mandamus is available as a basis for review when jury trial rights have been infringed. As stated in Dairy Queen Inc. v. Wood, 369 U.S. 469, 472-3 (1969):

> "Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now

> anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances,' Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." (Footnotes omitted.)

As stated in In re Hooker Investments, Inc., 937 F.2d 833, 837 (2d Cir. 1991):

> "Although we do not have jurisdiction over the Bank's attempted appeal as a matter of right from the non-final bar order, we may in appropriate circumstances treat an unsuccessful attempt to appeal as a petition for a writ of mandamus. See, e.g., Richardson Greenshields Securities, Inc.[v. Lau], 825 F.2d 647 (2d Cir. 1987). Indeed, the Bank has asked us to review the bar order under our mandamus power if we should find ourselves to be without statutory appellate jurisdiction. The Bank claims that the bar order threatens its seventh amendment right to a trial by jury in the adversary proceeding, and there is a clear line of cases holding that when an otherwise unappealable order denies a claimed right to a jury trial, immediate review may be obtained by way of a petition for mandamus." (Emphasis added.)

Thus petitioner's Seventh Amendment right to a jury trial can not be subverted by non-review of the district court's order. Contrary to respondents' contention (Br. p. 8, fn. 3), petitioner satisfied his burden to present genuine issues of triable fact with respect to whether an arbitration agreement even existed. (Petition, p. 11)

In contending that there is "no automatic jury trial rights" on such issue under Section 4 of the Federal Arbitration Act (Resp. Br. p. 8, fn. 8), respondents simply ignore the plain language of the statute which not only specifically provides for a jury trial of such issue, but also, contrary to the district court's order, provides that it shall take place before any arbitration can occur. The statute provides in pertinent part (9 U.S.C. § 4):

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. * * * Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose." (Emphasis added.)

Here, in contrast to respondents' contentions, petitioner has presented multiple triable issues of fact, and the burden to refute them is placed on respondents by the OWBPA, 29 U.S.C. § 626(f)(3). The disputed issues of fact are: first, whether the boilerplate application that petitioner was required to sign as a condition of employment applies to petitioner's age discrimination claim; second, whether petitioner knowingly agreed to arbitrate any claims arising under statute; and third, whether petitioner was coerced into signing the registration application.

Given the incredibly ambiguous circumstances and language used in the purported arbitration agreement as shown by petitioner's affidavit (52a-96a), the only clear inference to be drawn is that a reasonable jury could decide these factual issues in petitioner's favor. Thus, the district court acted contrary to its jurisdiction under 9 U.S.C. § 4 when it did not submit such issues to a jury.

CONCLUSION

The petition for writ of certiorari, or, in the alternative mandamus, should be granted.

September 17, 1997

Respectfully submitted,

WISEHART & KOCH

Arthur M. Wisehart

Arthur M. Wisehart
(Counsel of Record)

19 West 44th Street, Suite 412
New York, New York 10036
(212) 730-0044
Attorneys for Petitioner

APPENDIX

TABLE OF CONTENTS FOR APPENDIX

Wall Street Journal,
September 12, 1997, p. B19 . . . . RA1

EEOC Policy Statement on Mandatory Arbitration,
BNA's Emp. Disc. Rep., vol. 9,
July 10, 1997 . . . . RA4

Article from
The Wall Street Journal of September 12, 1997
entitled

WALL STREET'S FORCED ARBITRATION OF BIAS CLAIMS SET BACK BY EEOC

BY MARGARET A. JACOBS AND PATRICK MCGEEHAN
Staff Reporters of THE WALL STREET JOURNAL

The Equal Employment Opportunity Commission took its strongest stand yet against mandatory arbitration of discrimination claims in the securities industry, making an unusual finding that the practice is illegal in the high-profile Smith Barney case.

The finding is being viewed as a sign that the EEOC is willing to go to court to fight mandatory arbitration policies. The EEOC, charged with enforcing federal antidiscrimination laws, has widely criticized the practice, most recently in a broad policy statement in July. It also went to court in at least one case to prevent an employer from firing people who refused to sign arbitration agreements. Individual commissioners, meanwhile, have been especially critical of securities-industry arbitration.

Ellen Vargyas, legal counsel for the agency, declined to comment on the finding. However, she said: "There's no question that we intend to litigate in this area."

Carrie Menkel-Meadow, a law professor at Georgetown Law Center, notes that, while the Supreme Court approved of mandatory arbitration in 1991, lower courts have been split on many issues that its decision left unresolved. The EEOC, she says, may be positioning itself to make sure the issue goes back to the high court.

"We read this as a broad proclamation that the EEOC won't condone mandatory arbitration as a condition of employment," says Linda Friedman, an attorney for the women who are suing Smith Barney Inc.

George Saks, general counsel for Smith Barney, said in a prepared statement: "While we are aware of the EEOC's view, numerous courts including the Supreme Court have consistently upheld the fairness of employee arbitration. We are happy to discuss this further as the EEOC has suggested."

The rare finding involves Eileen Valentino, a former broker in Smith Barney's Paramus, N.J., office. Ms. Valentino filed an arbitration complaint with the National Association of Securities Dealers, alleging sexual harassment against the brokerage house and several brokers in 1993. The NASD handles most arbitration cases for the securities industry, which requires employees to arbitrate discrimination complaints rather than take them to court.

Over Ms. Valentino's objections, a panel of three male arbitrators hearing the case required her to undergo psychological and medical exams in order to seek damages for emotional distress. When she learned that arbitration rules didn't provide for an effective way to keep the sexual and other information learned in the exams confidential, Ms. Valentino settled her claims. In federal court, judges can issue orders to prevent public disclosure of confidential information.

Ms. Valentino later joined a larger lawsuit brought against Smith Barney by 22 other women, alleging that the arbitration process itself is illegal because, among other things, it provided her with fewer legal rights than she would have had in court. The suit, filed in federal court in New York, alleges a widespread pattern of sex discrimination at Smith Barney.

She also filed a separate charge with the EEOC, prompting an investigation and resulting in the finding of probable cause earlier this week. Last year, the EEOC issued such findings in only 2.2% of the 78,000 charges filed. The agency will now attempt to settle Ms. Valentino's allegations but, if talks fail, it could file a lawsuit on her behalf.

The EEOC's action comes as lawyers for Smith Barney, a unit of **Travelers Group**, are trying to wrap up a settlement in the larger case. **Merrill Lynch** & Co., the nation's biggest brokerage firm, is trying to settle a separate sex-discrimination suit, with the help of the same mediator that is involved in the Smith Barney case.

A Merrill spokeswoman said, "We have agreed to enter into preliminary settlement discussions," but declined further comment.

Securities-industry officials downplayed the importance of the EEOC's move, citing recent federal-court decisions that supported companies' use of arbitration to settle employee disputes. It wasn't clear whether the finding in the Valentino case would have any effect on settlement talks in the larger Smith Barney suit, which people familiar with the situation said might conclude in the next several weeks.

That suit attracted heavy nationwide publicity for its allegations of brokers' mistreatment of female co-workers and, in one branch, engaging in fraternity-house antics in a basement clubhouse known as the "boom-boom room." A settlement agreement would then be submitted to a federal judge for approval.

Facing mounting criticism of mandatory arbitration, the NASD last month proposed that its rules be changed to no longer require that all licensed brokerage employees arbitrate discrimination disputes. But the new policy would allow brokerage firms to require arbitration on their own.

RA 4

EEOC Policy Statement on Mandatory Arbitration

EEOC NOTICE Number 915.002, 7/10/97

1. *SUBJECT:* Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.

2. *PURPOSE:* This policy statement sets out the Commission's policy on the mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment.

3. *EFFECTIVE* DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. *ORIGINATOR:* Coordination and Guidance Programs, Office of Legal Counsel.

6. *INSTRUCTIONS:* File in Volume II of the EEOC Compliance Manual.

7. *SUBJECT MATTER:*

The United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency charged with the interpretation and enforcement of this nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. EEOC Motions on Alternative Dispute Resolution, Motion 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).[1] This policy statement sets out in further detail the basis for the Commission's position.

---

[1] Although binding arbitration does not, in and of itself, undermine the purposes of the laws enforced by the EEOC, the Commission believes that this is the result when it is imposed as a term or condition of employment.

I. Background

An increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration. These agreements may be presented in the form of an employment contract or be included in an employee handbook or elsewhere. Some employers have even included such agreements in employment applications. The use of these agreements is not limited to particular industries, but can be found in various sectors of the workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services. Some individuals subject to mandatory arbitration agreements have challenged the enforceability of these agreements by bringing employment discrimination actions in the courts. The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 33 (1991).[2] Nonetheless, for the reasons stated herein. the Commission believes that such agreements are inconsistent with the civil rights laws.

II. The Federal Civil Rights Laws Are Squarely Based In This Nation's History And Constitutional Framework And Are Of A Singular National Importance

Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional principles, and this nation's history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.

---

[2] The *Gilmer* decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in *Gilmer* was not contained in an employment contract. 500 U.S. at 25 n.2. Even if *Gilmer* had involved an agreement with an employer, the issue would remain open given the active role of the legislative branch in shaping the development of employment discrimination law. *See* discussion *infra* at section IV. B.

Title VII of the historic Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment to the Constitution.[3] Congress considered this national policy against discrimination to be of the "highest priority" (*Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)), and of "paramount importance" (H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*)),[4] *reprinted in* 1964

---

[3] *See, e.g.*, H.R. Rep. No. 88-914, pt. 1 (1963), *reprinted in* United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 ("1964 Leg. Hist.") at 2016 (the Civil Rights Act of 1964 was "designed primarily to protect and provide more effective means to enforce . . . *civil* rights"); H.R. Rep. No.88-914, pt.2 (1963) (separate views of Rep. McCulloch *et al.*), *reprinted in* 1964 Leg. Hist. at 2122 ("[a] key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several States"); Charles & Barbara Whalen, The Longest Debate: A legislative history of the 1964 Civil Rights Act 104 (1985) (opening statement of Rep. Celler on House debate of H.R. 7152: "The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. . . . [W]hat it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people. . . ."); H.R. Rep. No. 92-238 (1971), reprinted in Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Leg. Hist.") at 63 (1972 amendments to Title VII are a "reaffirmation of our national policy of equal opportunity in employment").

[4] William McCulloch (R-Ohio) was the ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, to which the civil rights bill (H.R. 7152) was referred for initial consideration by Congress. McCulloch was among the individuals responsible for working out a compromise bill that was ultimately substituted by the full Judiciary Committee for the bill reported out by Subcommittee No. 5. His

Leg. Hist. at 2123.[5] The Civil Rights Act of 1964, 42 U.S.C. § 2000a et *seq.*, was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this Nation—the ideals of freedom, equality, justice, and opportunity." H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*), *reprinted in* 1964 Leg. Hist. at 2123. President John F. Kennedy, in addressing the nation regarding his intention to introduce a comprehensive civil rights bill, stated the issue as follows:

> We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.
>
> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President John F. Kennedy's Radio and Television Report to the American People on Civil Rights (June 11, 1963), Pub. Papers 468, 469 (1963).[6]

---

views, which were joined by six members of Congress, are thus particularly noteworthy.

[5] *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (The Civil Rights Act of 1964 is a "complex legislative design directed at an historic evil of national proportions").

[6] Commitment to our national policy to eradicate discrimination continues today to be of the utmost importance. As President Clinton stated in his second inaugural address:

> Our greatest responsibility is to embrace a new spirit of community for a new century . . . . The challenge of our past remains the challenge of our future: Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?
>
> The divide of race has been America's constant curse. And each new wave of immigrants gives new targets to old prejudices . . . . These forces have nearly destroyed our Nation in the past. They plague us still.

(*footnote continued*)

Title VII is but one of several federal employment discrimination laws enforced by the Commission which are "part of a wider statutory scheme to protect employees in the workplace nationwide," *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). *See* the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.;* and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflects a societal condemnation of invidious bias in employment decisions." *McKennon*, 513 U.S. at 357. The ADA explicitly provides that its purpose is, in part, to invoke congressional power to enforce the Fourteenth Amendment. 29 U.S.C. § 12101(b)(4). Upon signing the ADA, President George Bush remarked that "the American people have once again given clear expression to our most basic ideals of freedom and equality." President George Bush's Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), Pub. Papers 1070 (1990 Book II).

III. The Federal Government Has The Primary Responsibility For The Enforcement Of The Federal Employment Discrimination Laws

The federal employment discrimination laws implement national values of the utmost importance through the institution of public and uniform standards of equal opportunity in the workplace. *See* text and notes *supra* in Section II. Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards. and the public values they embody, to the federal government. It did so in three principal ways. First, it created the Commission, initially giving it authority to investigate

---

President William J. Clinton's Inaugural Address (Jan. 20, 1997), 33 Weekly Comp. Pres. Doc. 61 (Jan. 97, 1997).

and conciliate claims of discrimination and to interpret the law, *see* §§ 706(b) and 713 of Title VII, 42 U.S.C. §§ 2000e-5(b) and 2000e-12, and subsequently giving it litigation authority in order to bring cases in court that it could not administratively resolve, *see* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). Second, Congress granted certain enforcement authority to the Department of Justice, principally with regard to the litigation of cases involving state and local governments. *See* §§ 706(f)(1) and 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and 2000e-6. Third, it established a private right of action to enable aggrieved individuals to bring their claims directly in the federal courts, after first administratively bringing their claims to the Commission. *See* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).[7]

While providing the states with an enforcement role *see* 42 U.S.C. §§ 2000e-5(c) and (d), as well as recognizing the importance of voluntary compliance by employers, *see* 42 U.S.C. § 2000e-5(b), Congress emphasized that it is the federal government that has ultimate enforcement responsibility. As Senator Humphrey stated, "[t]he basic rights protected by [Title VII] are rights which accrue to citizens of the United States, the Federal Government has the clear obligation to see that these rights are fully protected." 110 Cong. Rec. 12725 (1964). *Cf. General Tel. Co. v. EEOC,* 446 U.S. 318, 326 (1980) (in bringing enforcement actions under Title VII, the EEOC "is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement' ") (*quoting* 118 Cong. Rec. 4941 (1972)).

The importance of the federal government's role in the enforcement of the civil rights laws was reaffirmed by Congress in the ADA, which explicitly provides that its purposes include "ensur[ing] that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

---

[7] Section 107 of the ADA specifically incorporates the powers, remedies, and procedures set forth in Title VII with respect to the Commission, the Attorney General, and aggrieved individuals. *See* 42 U.S.C. § 12117. Similar enforcement provisions are contained in the ADEA. *See* 29 U.S.C. §§ 626 and 628.

IV. Within This Framework, The Federal Courts Are Charged With The Ultimate Responsibility For Enforcing The Discrimination Laws

While the Commission is the primary federal agency responsible for enforcing the employment discrimination laws, the courts have been vested with the final responsibility for statutory enforcement through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief.[8] *See, e.g.*, *Kremer v. Chemical Constr. Corp.*, 454 U.S. 461, 479 n.20 (1982) ("federal courts were entrusted with ultimate enforcement responsibility" of Title VII); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) ("Of course the 'ultimate authority' to secure compliance with Title VII resides in the federal courts").[9]

A. The Courts Are Responsible For The Development And Interpretation Of The Law

As the Supreme Court emphasized in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974), "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." This principle applies equally to the other employment discrimination statutes.

---

[8] In addition, unlike arbitrators, courts have coercive authority, such as the contempt power, which they can use to secure compliance.

[9] *See also* H.R. Rep. No. 88-314. pt.2 (1963) (separate views of Rep. McCulloch et al.), *reprinted in* 1964 Leg. Hist. at 2150 (explaining that EEOC was not given cease-and-desist powers in the final House version of the Civil Rights Act of 1964, H.R. 7152, because it was "preferred that the ultimate determination of discrimination rest with the Federal judiciary").

While the statutes set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. Absent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1974), or sexual harassment, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Yet these two doctrines have proved essential to the effort to free the workplace from unlawful discrimination, and are broadly accepted today as key elements of civil rights law.

B. The Public Nature Of The Judicial Process Enables The Public, Higher Courts, And Congress To Ensure That The Discrimination Laws Are Properly Interpreted And Applied

Through its public nature—manifested through published decisions—the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the antidiscrimination laws in accord with the public values underlying them, they are subject to correction by higher level courts and by Congress.

These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) (former employee may bring a claim for retaliation); *O'Connor v. Consolidated Coin Caterers, Corp.*, 116 S. Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); *McKennon*, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and *Harris*, 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

Congressional action to correct Supreme Court departures from congressional intent has included, for example, legislative amendments in response to Court rulings that: pregnancy discrimination is not necessarily discrimination based on sex (*General Elec. Co. v. Gilbert*, 429 U.S. 125 (1978), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), overruled by Pregnancy Discrimination Act of 1978); that an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact *(Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), overruled by §§ 104 and 105 of the Civil Rights Act of 1991); that an employer avoids liability by showing that it would have taken the same action absent any discriminatory motive *(Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), overruled, in part, by § 107 of the Civil Rights Act of 1991); that mandatory retirement pursuant to a benefit plan in effect prior to enactment of the ADEA is not prohibited age discrimination *(United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) overruled by 1978 ADEA amendments); and, that age discrimination in fringe benefits is not unlawful *(Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), overruled by Older Workers Benefit Protection Act of 1990).

C. The Courts Play A Crucial Role In Preventing And Deterring Discrimination And In Making Discrimination Victims Whole

The courts also play a critical role in preventing and deterring violations of the law, as well as providing remedies for discrimination victims. By establishing precedent, the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws. By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. Finally, by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct. As has been illustrated time and again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior.

D. The Private Right Of Action With Its Guarantee Of Individual Access To The Courts Is Essential To The Statutory Enforcement Scheme

The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme. *See, e.g., McKennon*, 513 U.S. at 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA). The courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum. The Supreme Court has cautioned that, "courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." *Gardner-Denver*, 415 U.S. at 60 n.21.[10]

Under the enforcement scheme for the federal employment discrimination laws, individual litigants act as "private attorneys general." In bringing a claim in court, the civil rights plaintiff serves not only her or his private interests, but also serves as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418

---

[10] *See also* 118 Cong. Rec. S7168 (March 6, 1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972, as agreed to by the conference committees of each House; analysis of § 706(f)(1) provides that, while it is hoped that most cases will be handled through the EEOC with recourse to a private lawsuit as the exception, "as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief").

(1978) (*quoting Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). *See also McKennon*, 513 U.S. at 358 ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA").

V. Mandatory Arbitration Of Employment Discrimination Disputes "Privatizes" Enforcement Of The Federal Employment Discrimination Laws, Thus Undermining Public Enforcement Of The Laws

The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, when imposed as a condition of employment, it is structurally biased against applicants and employees.

A. Mandatory Arbitration Has limitations That Are Inherent And Therefore Cannot Be Cured By The Improvement Of Arbitration Systems

That arbitration is substantially different from litigation in the judicial forum is precisely the reason for its use as a form of ADR. Even the fairest of arbitral mechanisms will differ strikingly from the judicial forum.

1. The Arbitral Process Is Private In Nature And Thus Allows For Little Public Accountability

The nature of the arbitral process allows—by design—for minimal, if any, public accountability of arbitrators or arbitral decision-making. Unlike her or his counterparts in the judiciary, the arbitrator answers only to the private parties to the dispute, and not to the public at large. As the Supreme Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .
>
> *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (quoting from Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)).

The public plays no role in an arbitrator's selection s/he is hired by the private parties to a dispute. Similarly, the arbitrator's authority is defined and conferred not by public law, but by private agreement.[11] While the courts are charged with giving force to the public values reflected in the antidiscrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute. As noted by one commentator, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason." Owen Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1673 (1985).

Moreover, because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence *(see* discussion *supra* at 8), but also prevents assessment of whether practices of individual employers or particular industries are in need of reform. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance." *McKennon,* 513 U.S. at 358-59.

---

[11] Article 111 of the Constitution provides Several judges with life tenure and salary protection to safeguard the independence of the judiciary. No such safeguards apply to the arbitrator. The importance of these safeguards was stressed in the debates on the 1972 amendments to Title VII. Senator Dominick, in offering an amendment giving the EEOC the right to file a civil action in lieu of cease-and-desist powers, explained that the purpose of the amendment was to "vest adjudicatory power where it belongs—in impartial judges shielded from political winds by life tenure." 1972 Leg. Hist. at 549. The amendment was later revised in minor respects and adopted by the Senate.

2. *Arbitration, By Its Nature, Does Not Allow For The Development Of The Law*

Arbitral decisions may not be required to be written or reasoned, and are not made public without the consent of the parties. Judicial review of arbitral decisions is limited to the narrowest of grounds.[12] As a result, arbitration affords no opportunity to build a jurisprudence through precedent.[13]

---

[12] Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud or misconduct. 9 U.S.C. § 10. Judicially created standards of review allow an arbitral award to be vacated where it clearly violates a public policy that is explicit, well-defined, "dominant" and ascertainable from the law, *see United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987), or where it is in "manifest disregard" of the law, *see Wilko v.* Swan, 346 U.S. 427, 436-37 (1953). The latter standard of review has been described by one commentator as "a virtually insurmountable" hurdle. *See* Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. Rev. 759 767. *But cf. Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-87 (1997) (in the context of mandatory employment arbitration of statutory disputes, the court interprets judicial review under the "manifest disregard" standard to be sufficiently broad to ensure that the law has been properly interpreted and applied).

[13] Congress has recognized the inappropriateness of ADR where "a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent," *see* Alternative Dispute Resolution Act, 5 U.S.C. § 572(b)(1) (providing for use of ADR by federal administrative agencies where the parties agree); or where "the case involves

Moreover, there is virtually no opportunity for meaningful scrutiny of arbitral decision-making. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation. The risks for the vigorous enforcement of the civil rights laws are profound. *See* discussion *supra* at section IV. B.

3. Additional Aspects Of Arbitration Systems Limit Claimants' Rights In Important Respects

Arbitration systems, regardless of how fair they may be, limit the rights of injured individuals in other important ways. To begin with, the civil rights litigant often has available the choice to have her or his case heard by a jury of peers, while in the arbitral forum juries are, by definition, unavailable. Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure. In addition, arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination. They may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader—and more accurate—view of an employer's conduct.

---

complex or novel legal issues," *see* Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652(c)(2) (providing for court-annexed arbitration; §§ 652(b)(1) and (2) also require the parties' consent to arbitrate constitutional or statutory civil rights claims). Similar findings were made by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperalion ("Brock Commission"), which was charged with examining labor-management cooperation in state and local government. The Task Force's report, "Working Together for Public Service" (1996) ("Brock Report"), recommended "Quality Standards and Key Principles for Effective Alternative Dispute Resolution Systems for Rights Guaranteed by Public Law and for Other Workplace Disputes" which include that "ADR should normally not be used in cases that represent tests of significant legal principles or class action." Brock Report at 82.

B. Mandatory Arbitration Systems Include Structural Biases Against Discrimination Plaintiffs

In addition to the substantial and inevitable differences between the arbitral and judicial forums that have already been discussed, when arbitration of employment disputes is imposed as a condition of employment, bias inheres against the employee.[14]

First, the employer accrues a valuable structural advantage because it is a "repeat player." The employer is a party to arbitration in all disputes with its employees. In contrast, the employee is a "one-shot player"; s/he is a party to arbitration only in her or his own dispute with the employer. As a result, the employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator's record. In addition, results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator.[15] A recent study of nonunion employment law cases[16] found that the more frequent a user of arbitration an employer is, the better the employer fares in arbitration.[17]

---

[14] A survey of employment discrimination arbitration awards in the securities industry, which requires as a condition of employment that ail brokers resolve employment disputes through arbitration, found that "employers stand a greater chance of success in arbitration than in court before a jury" and are subjected to "smaller" damage awards. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp.*, 21 Empl. Rel. L.J. 21, 43 (autumn 1995).

[15] *See, e.g.*, Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 936 (1979) ("an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved m the selection process"); Reginald Alleyne, *Statutory Discrimination Claims: Rights Waived and Lost in the Arbitration Forum*, 13 Hofstra Lab. L.J. 381, 428 (Spring 1996) ("statutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side").

In addition, unlike voluntary post-dispute arbitration—which must be fair enough to be attractive to the employee—the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit. The terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate. We are aware of no examples of employees who insist on the mandatory arbitration of future statutory employment disputes as a condition of accepting a job offer—the very suggestion seems far-fetched. Rather, these agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power. It is thus not surprising that many employer-mandated arbitration systems fail far short of basic concepts of fairness. Indeed, the Commission has challenged—by litigation, *amicus curiae* participation, or Commissioner charge—particular mandatory arbitration agreements that include provisions flagrantly eviscerating core rights and remedies that are available under the civil rights laws.[18]

---

[16] Arbitration of labor disputes pursuant to a collective bargaining agreement is less likely to favor the employer as a repeat-player because the union, as collective bargaining representative, is also a repeat-player.

[17] *See* Lisa Gingham, "Employment Arbitration: The effect of repeat-player status, employee category and gender on arbitration outcomes," (unpublished study on file with the author, an assistant professor at Indiana U. School of Public & Environmental Affairs).

[18] Challenged agreements have included provisions that: (1) impose filing deadlines far shorter than those provided by statute; (2) limit remedies to "out-of-pocket" damages; (3) deny any award of attorney's fees to the civil rights claimant, should s/he prevail; (4) wholly deny or limit punitive and liquidated damages; (5) limit back pay to a time period much shorter than that provided by statute; (6) wholly deny or limit front pay to a time period far shorter than that ordered by courts; (7) deny any and all discovery; and (8) allow for payment by each party of one-half of

The Commission's conclusions in this regard are consistent with those of other analyses of mandatory arbitration. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") was appointed by the Secretary of Labor and the Secretary of Commerce to, in part, address alternative means to resolve workplace disputes. In its Report and Recommendations (Dec. 1994) ("Dunlop Report"), the Dunlop Commission found that recent employer experimentation with arbitration has produced a range of programs that include "mechanisms that appear to be of dubious merit for enforcing the public values embedded in our laws." Dunlop Report at 27. In addition, a report by the U.S. General Accounting Office, surveying private employers' use of DAR mechanisms, found that existing employer arbitration systems vary greatly and that "most" do not conform to standards recommended by the Dunlop Commission to ensure fairness. *See* "Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution" at 15, HEHS-95-150 (July 1995).

The Dunlop Commission strongly recommended that binding arbitration agreements not be enforceable as a condition of employment:

> The public rights embodied in state and federal employment law—such as freedom from discrimination in the workplace . . .—are an important part of the social and economic protections of the nation. Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job.

Dunlop Report at 32. The Brock Commission *(see supra* n.13) agreed with the Dunlop Commission's opposition to mandatory arbitration *of* employment disputes and recommended that all employee agreements to arbitrate be voluntary and

---

the costs of arbitration and, should the employer prevail, require the claimant, in the arbitrator's discretion, to pay the employer's share of arbitration costs as well.

post-dispute. Brock Report at 81-82. In addition, the National Academy of Arbitrators recently issued a statement opposing mandatory arbitration as a condition of employment "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." *See* National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

C. Mandatory Arbitration Agreements Will Adversely Affect The Commission's Ability To Enforce The Civil Rights Laws

The trend to impose mandatory arbitration agreements as a condition of employment also poses a significant threat to the EEOC's statutory responsibility to enforce the federal employment discrimination laws. Effective enforcement by the Commission depends in large part on the initiative of individuals to report instances of discrimination to the Commission. Although employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC or otherwise interfere with individuals' protected participation in investigations or proceedings under these laws,[19] employees who are bound by mandatory arbitration agreements may be unaware that they nonetheless may file an EEOC charge. Moreover, individuals are likely to be discouraged from coming to the Commission when they know they will be unable to litigate their claims in court.[20] These chilling effects on charge filing undermine the

---

[19] *See* "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes." Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

[20] The Commission remains able to bring suit despite the existence of a mandatory arbitration agreement because it acts "to vindicate the public interest in preventing employment discrimination," *General Tel.*, 446 U.S. at 326. *Cf.* S.Rep. No. 101-263 (1990) *reprinted in*, Legislative History of The Older Workers Benefit Protection Act, at 354 (amendment to ADEA § 626(f)(4), which provides that "no waiver agreement may

Commission's enforcement efforts by decreasing channels of information, limiting the agency's awareness of potential violations of law, and impeding its ability to investigate possible unlawful actions and attempt informal resolution.

VI. Voluntary, Post-Dispute Agreements To Arbitrate Appropriately Balance The Legitimate Goals Of Alternate Dispute Resolution And The Need To Preserve the Enforcement Framework Of The Civil Rights Laws

The Commission is on record in strong support of *voluntary* alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen. We reaffirm that support here. This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense.[21] Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration. This is consistent with civil rights enforcement as long as the individual's decision is freely made after a dispute has arisen.[22]

---

affect the Commission's rights and responsibilities to enforce [the ADEA]," was intended "as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest"). As a practical matter, however, the Commission's ability to litigate is limited by its available resources.

[21] Despite conventional wisdom to the contrary, the financial costs of arbitration can be significant and may represent no savings over litigation in a judicial forum. These costs may include the arbitrator's fee and expenses; fees charged by the entity providing arbitration services, which may include filing fees and daily administrative fees; space rental fees; and court reporter fees.

[22] The Dunlop Commission similarly supported voluntary forms of ADR, but based its opposition to mandatory arbitration on the premise

VII. Conclusion

The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts—an avenue of redress determined by Congress to be essential to enforcement.

Processing Instructions For The Field And Headquarters

1. Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

2. Pursuant to the statement of priorities in the National Enforcement Plan, *see* § B(1)(h), the Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment. *See, e.g.*, Briefs of the EEOC as *Amicus Curiae* in *Seus v. John Nuveen & Co.*, No. 96-CV-5971 (E.D. Pa.) (Br. filed Jan. 11, 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, No. 96-2652 (7th Cir.) (Br. filed Sept. 23, 1996); *Johnson v. Hubbard Broadcasting, Inc.*, No. 4-96-107 (D. Minn.) (Br. Filed May 17, 1996);

---

that the avenue of redress for statutory employment rights should be chosen by the individual rather than dictated by the employer. Dunlop Report at 33.

Great Western Mortgage Corp. v. Peacock, No. 96-5273 (3d Cir.) (Br. filed July 24, 1996).

Date 7/10/97

/s/ Gilbert F. Casellas
Chairman